

1-1-1989

## A Proposal for the Development of a System of Indigenous Jurisprudence in the Federated States of Micronesia

Brian Z. Tamanaha

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### Recommended Citation

Brian Z. Tamanaha, *A Proposal for the Development of a System of Indigenous Jurisprudence in the Federated States of Micronesia*, 13 HASTINGS INT'L & COMP. L. REV. 71 (1989).  
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# A Proposal For the Development of a System of Indigenous Jurisprudence in the Federated States of Micronesia

By BRIAN Z. TAMANAHA\*

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## I. INTRODUCTION

When the United States terminated the Trust Territory of the Pacific Islands, it left behind a legal imprint deeply inscribed on Micronesian culture and society. The Micronesians have since struggled with this legacy. Like other decolonized areas around the world, there continues to be a clash between the transplanted legal system and the indigenous culture. The people of Micronesia viewed independence as a long-awaited opportunity, a chance to draw up a new system that was their

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own, that matched the Micronesian way. As this article will illustrate, this optimism has not been rewarded.

This article will focus on this issue from the standpoint of the judiciary. First, relevant decisions of the Supreme Court of the Federated States of Micronesia will be critically examined, delving beneath the legal language to expose the reality that, despite appearances, the law continues to be exclusively derived from the United States and it has not accommodated custom or social-cultural aspects of Micronesian life. Nothing has changed. Second, to offer insight into why this has happened, similar situations around the world will be surveyed, drawing heavily from anthropological studies.

This article will argue that the prevailing methods relied upon in decolonized areas to make legal systems indigenous, which are uniformly directed toward incorporating customary law norms into the legal system, cannot succeed. Despite the overall failure of these various strategies, they continue to be doggedly applied. These strategies actually lead to an entrenched dualistic system which will have the long term effect of perpetuating a sharp division in the society. Finally, this article proposes a reorientation of the legal system which begins with a simple but essential change in attitude.

## II. FEDERATED STATES OF MICRONESIA

### A. Constitution and Judicial Guidance Clause

The Federated States of Micronesia (FSM) is one of the four distinct political entities to arise out of the United States administered Trust Territory of the Pacific Islands.<sup>1</sup> After over a century of foreign domination—successively under the Spanish, Germans, Japanese, and Americans<sup>2</sup>—the people of Micronesia finally gained political indepen-

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1. See U.S. DEPT OF STATE, 39TH ANNUAL REPORT TO THE UNITED NATIONS ON THE ADMINISTRATION OF THE TRUST TERRITORY OF THE PACIFIC ISLANDS 1 (1987). The other three entities are the Republic of Belau, the Republic of the Marshall Islands, and the Commonwealth of the Northern Mariana Islands (CNMI). Of the original Trust Territories only CNMI decided against independent status. See Leibowitz, *The Marianas Covenant Negotiations*, 4 FORDHAM INT'L L.J. 19 (1981).

2. See generally E. COCKRUM, *THE EMERGENCE OF MODERN MICRONESIA* (1970). Spain exerted control over the Caroline Islands, the geographical area of the FSM in 1874. *Id.* at 35. Germany purchased the islands from Spain after the Spanish-American War and held them until World War I. *Id.* at 64, 74-75. Then Japan gained control over the area under a League of Nations Mandate. See Mandate for the Former German Possessions in the Pacific Ocean Lying North of the Equator, 2 LEAGUE OF NATIONS O.J. 84, 87-88 (1922), reprinted in 42 Stat. 2149, 12 L.N.T.S. 202 (1922). Following World War II, the United States became the administering authority under the United Nations created Trusteeship. See Trusteeship

dence on November 3, 1986,<sup>3</sup> as a new nation in the international community.<sup>4</sup> Independence was achieved in several transitional steps, beginning with negotiations, followed by the drafting and ratification of a constitution, the assumption of executive, legislative, and judicial functions, and finally the execution of the agreement with the United States to terminate the Trusteeship.

Similar to other formerly colonized areas in the Pacific region, the reassertion of custom and tradition became a predominant refrain, coalescing the people of Micronesia in their exertion of self-governance. At the Micronesian Constitutional Convention, held in 1975 with delegates from the entire region, concern about the future role of custom and traditional leaders permeated many of the critical issues.<sup>5</sup> Although the "modernists" and the "traditionalists" differed sharply about the extent to which custom should be incorporated into the constitution, there was an underlying consensus that some measure of protection and perpetuation was necessary.<sup>6</sup> The product of this Convention was the Constitution of the Federated States of Micronesia, ratified on July 12, 1978, by Yap, Pohnpei, Truk, and Kosrae.<sup>7</sup> These four ratifying areas form separate states within the FSM, bound to the FSM Constitution in an arrangement similar to that of the states in the United States.<sup>8</sup> In many respects the FSM Constitution and the form of government it sets out is almost identical to that of the United States, with a three branch system

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Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189-90 (approved by United States on July 18, 1947).

3. See PRESIDENT'S PERSONAL REPRESENTATIVE FOR MICRONESIAN STATUS NEGOTIATIONS, COMPILATION OF AGREEMENTS BETWEEN THE GOVERNMENT OF THE UNITED STATES AND THE FREELY ASSOCIATED STATE OF THE FEDERATED STATES OF MICRONESIA (1987).

4. Whether the FSM has independent nation status under international law is open to debate because the United States dissolved the Trusteeship without the required approval of the U.N. Security Council. See Recent Development, *The Compact of Free Association: An End to the Trust Territory of the Pacific Islands*, 5 B.U. INT'L L.J. 213 (1987).

5. See N. MELLER, CONSTITUTIONALISM IN MICRONESIA 261-81 (1977).

6. *Id.* at 262.

7. Burdick, *The Constitution of the Federated States of Micronesia*, 8 U. HAW. L. REV. 419, 429 (1986). There were also delegates from the Marianas, Palau, and the Marshalls. The Marianas had already agreed to a Covenant with the United States to become a Commonwealth, so they did not vote on ratification. *Id.* at 426. Voters in Palau and the Marshalls rejected the Constitution and later formed their own separate republics. *Id.* at 429. The effective date of the Constitution is July 12, 1979, one year following ratification. FSM CONST. art. XVI, § 1.

8. See generally *Suldan v. FSM* (II), 1 F.S.M. Intrm. 339, 342-50 (Pon. 1983) ("Thus, the Constitution allocates powers between state and national governments and among the executive, legislative and judicial branches of the national government but exercise of those powers must be in accordance with the [FSM] Constitution itself.").

of government and a bill of rights, along with many other points of similarity. Indeed much of the language was borrowed directly from the United States Constitution.<sup>9</sup>

Two separate parts of the Constitution address custom and tradition. Article V of the Constitution is devoted exclusively to custom and traditional leaders. The first section of this Article explicitly preserves the "role or function of a traditional leader as recognized by custom and tradition. . . ."<sup>10</sup> Section 2 provides that "[t]he traditions of the people of the Federated States of Micronesia may be protected by statute. If challenged as violative of Article IV [Declaration of Rights], protection of Micronesian tradition shall be considered a compelling social purpose warranting such governmental action."<sup>11</sup> Due to the fact that customs vary widely between states and even between areas within a state, legislative protection under this section was intended to occur primarily at the state level.<sup>12</sup> The third section of Article V allows the Congress to establish a "Chamber of Chiefs consisting of traditional leaders" when needed, and allows the states to provide functional roles for traditional leaders.<sup>13</sup> Due to legislative inertia and the inherent difficulty of codifying custom, no statutes have been enacted protecting specific traditions to date, and only one state has provided traditional leaders with a role in the government.<sup>14</sup> Thus, for practical purposes Article V has been inoperative.

A separate, more consequential provision in the Constitution relating to custom is contained in Article XI — the Section II Judicial Guidance Clause — which reads: "Court decisions shall be consistent with this Constitution, Micronesian customs and traditions, and the social and

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9. See *Suldan v. FSM* (II), 1 F.S.M. Intrm. 339 (Pon. 1983) (similarity of constitutions indicates power of judicial review in FSM court); *Alaphonso v. FSM*, 1 F.S.M. Intrm. 209, 214-215 (App. 1982) ("Most concepts and many actual words and phrases employed in the Declaration of Rights come directly from the United States Constitution."). One major reason for this resemblance is that legal staff members at the Convention were for the most part American trained attorneys who simply borrowed language with which they were familiar. See N. MELLER, *supra* note 5, at 196-201. In addition, the Micronesians had lived under the American system for over three decades and perhaps for that reason felt comfortable retaining it. *Id.*

10. FSM CONST. art. V, § 1.

11. FSM CONST. art. V, § 2.

12. See *Burdick*, *supra* note 7, at 461 n.304; see also FSM CONST. preamble ("To make one nation of many islands, we respect the diversity of our cultures.").

13. FSM CONST. art. V, § 3.

14. See generally Tamanaha, *The Role of Custom and Traditional Leaders under the Yap Constitution*, 10 U. HAW L. REV. 81 (1988). The Yap Constitution provides for Councils of traditional leaders which wield considerable governmental power, including absolute veto power over legislation which concerns custom and tradition. *Id.* at 94-97.

geographical configuration of Micronesia.”<sup>15</sup> This clause was in effect a repudiation of the former Trust Territory High Court’s baneful treatment of custom and tradition.<sup>16</sup> The High Court had consistently disregarded or declared invalid customs which were in conflict with written law or offensive to a particular judge’s sense of justice.<sup>17</sup> Legislative history to this provision eloquently conveys the delegates’ dismay at this past treatment and expresses the desire to create a body of law more appropriate to Micronesia and more solicitous of custom and tradition:

The intent and purpose of this provision is that future Micronesian courts base their decisions not on what has been done in the past but on a new basis which will allow the consideration of the pertinent aspects of Micronesian society and culture.

The failure to include such a provision in the Constitution may cause the courts to follow the decisions of past Trust Territory cases or various foreign decisions which have dealt with similar interpretive or legal questions. This may be undesirable since much of the reasoning utilized in these various courts may not be relevant here in Micronesia. Micronesia is an island nation scattered over a large expanse of ocean. Customary and traditional values are an important part of our society and lifestyle. It is important that this constitution be interpreted in light of our customs and traditions. . . .

. . . [I]n the past the courts in the Trust Territory have copied to a great extent English common law which the Committee feels is not always a relevant basis for decision here in Micronesia. . . .<sup>18</sup>

These excerpts reflect a sophisticated awareness borne of experience that laws based on Western models pose potential danger to the Micronesian way of life. Sadly, despite recognition by the FSM Supreme Court that the “Judicial Guidance Clause was intended to have a pervasive effect on the decisionmaking of the Court,”<sup>19</sup> a review of the reported deci-

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15. FSM CONST. art. XI, § 11.

16. See Burdick, *supra* note 7, at 477. Early versions of the Judicial Guidance Clause explicitly declared that Trust Territory High Court decisions were not to bind FSM courts. See 1 JOURNAL OF THE MICRONESIAN CONSTITUTIONAL CONVENTION OF 1975, at 419-21 (1976) [hereinafter CONSTITUTIONAL CONVENTION]; *Standing Committee Rep. No. 34*, in 2 CONSTITUTIONAL CONVENTION, *supra*, at 821-22, 917.

17. See, e.g., *Ngiruhelbad v. Merii*, 2 T.T.R. 631 (App. Div. 1961); *Ngirasmengesong v. Trust Territory*, 1 T.T.R. 615 (App. Div. 1958); *Trust Territory v. Lone Lino*, 6 T.T.R. 7 (Tr. Div. Marshall Is. 1972); see also Arnett, *The American Legal System and Micronesian Customary Law: The Legal Legacy of the United States to the New Nations of the Trust Territory of the Pacific Islands*, 4 U.C.L.A. PACIFIC BASIN L.J. 161, 192-97 (1985).

18. *Standing Committee Report No. 34*, *supra* note 16, at 822. The reference to English common law is intended to refer to the use of American case law.

19. *Semens v. Continental Airlines*, 2 F.S.M. Intrm. 131, 139 (Pon. 1985).

sions reveals virtually no change in the pattern of strict adherence to U.S. common law doctrines.

## B. Supreme Court of the Federated States of Micronesia

Under Article XI of the Constitution, the "judicial power of the national government is vested in a Supreme Court and inferior courts established by statute."<sup>20</sup> Jurisdiction of the FSM Supreme Court is similar to that of federal courts in the United States: "original and exclusive jurisdiction in cases affecting officials of foreign governments, disputes between states, admiralty or maritime cases, and in cases in which the national government is a party except where an interest in land is at issue;"<sup>21</sup> and "concurrent original jurisdiction" in cases arising under the national constitution, laws or treaties, and in diversity cases.<sup>22</sup> The exclusion of FSM court jurisdiction over cases dealing with land was again a manifestation of the delegates' dislike of past rulings of the Trust Territory High Court.<sup>23</sup> The Constitutional Convention delegates preferred that land matters be dealt with by state officials, who "generally should have greater knowledge of use, local custom and expectations concerning land and personal property."<sup>24</sup>

The FSM Supreme Court officially came into existence on May 5, 1981,<sup>25</sup> replacing the Trust Territory High Court<sup>26</sup> and assuming jurisdiction over cases pursuant to the FSM Constitution.

Article XI authorizes the appointment of a Chief Justice and not more than five Associate Justices to the FSM Supreme Court.<sup>27</sup> Justices sit on both the trial and appellate levels.<sup>28</sup> However, "no justice may sit with the appellate division in a case heard by him in the trial division."<sup>29</sup>

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20. FSM CONST. art. XI, § 1. Thus far, no inferior courts on the national level have been established.

21. *Id.* § 6(a).

22. *Id.* § 6(b).

23. Burdick, *supra* note 7, at 476.

24. *In re Nahnsen*, 1 F.S.M. Intrm. 97, 107 (Pon. 1982); see also *Standing Committee Report No. 33*, in 2 CONSTITUTIONAL CONVENTION, *supra* note 16, at 814 ("The [legislative] powers which your Committee contemplates will be reserved to the states including . . . land law . . .").

25. *Truk v. Otokichy*, 1 F.S.M. Intrm. 127, 131 (Truk 1982); see also Turcott, *The Beginnings of the Federated States of Micronesia Supreme Court*, 5 U. HAW. L. REV. 361 (1983).

26. There were several disputes between the High Court and the FSM Supreme Court regarding the transition and their respective authority. See Bowman, *Legitimacy and Scope of Trust Territory High Court Power to Review Decisions of Federated States of Micronesia Supreme Court: The Otokichy Cases*, 5 U. HAW. L. REV. 57 (1983).

27. FSM CONST. art. XI, § 2.

28. *Id.*

29. *Id.*

The first reported opinion of the FSM Supreme Court was issued on August 3, 1981.<sup>30</sup> The Court has operated continuously ever since, with close to 150 decisions published by the end of 1988.<sup>31</sup> From its inception, the FSM Supreme Court has been exclusively comprised of Chief Justice Edward C. King and Associate Justice Richard H. Benson. Due to the dearth of indigenous attorneys,<sup>32</sup> both persons selected to be Justices were American expatriates and no other judges have been added since these first two were confirmed in 1980.<sup>33</sup>

Justice King sits as a trial judge alternating between Pohnpei and Kosrae; Justice Benson does likewise in Truk and Yap.<sup>34</sup> For appeals, each justice forms a panel with two temporarily appointed judges to hear cases tried by the other.<sup>35</sup> Justice King in his capacity as Chief Justice controls the selection of temporary judges who hear the appeals.<sup>36</sup> The judges appointed to serve on the appellate panels are usually drawn from the region, either local state court judges<sup>37</sup> or judges from Guam,<sup>38</sup> Palau,<sup>39</sup> or the Northern Mariana Islands,<sup>40</sup> although on occasion judges have been selected from as far away as Hawaii and California.<sup>41</sup> Thus, in

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30. *FSM v. Carl*, 1 F.S.M. Intrm. 1 (Pon. 1981).

31. The complete set of court reports of the FSM Supreme Court consists of 3 volumes, with the latest reported opinion, as of June 1989, being October 19, 1988. *See Truk State v. Maeda Const. Co.*, 3 F.S.M. Intrm. 487 (Truk 1988).

32. Most of the practicing lawyers in the FSM are American expatriate attorneys or Micronesian trial counselors without formal legal training. There is a small, increasing number of Micronesians who have attended or are attending law school in the United States and in Papua New Guinea. *See Turcott, supra* note 25, at 367-68.

33. Justice King graduated from Indiana University School of Law in 1964 and worked for a private law firm as well as in various public service positions, including four years as Deputy Director of the Micronesian Legal Services Corporation. *Id.* at 363. Justice Benson graduated from the University of Michigan Law School in 1956, engaged in private practice in South Carolina and Guam, and served as a judge in Guam for ten years. *Id.* at 364. Thus, prior to their appointments both spent a significant amount of time in the region.

34. *Id.* at 362.

35. *Id.* at 362-63.

36. *Id.*

37. *See, e.g., Fred v. FSM*, 3 F.S.M. Intrm. 141 (App. 1987) (Panel members were Justice Benson, Mamoru Nakamura, a Supreme Court Judge from the Republic of Belau, and Edwel H. Santos, a judge on the Pohnpei Supreme Court.).

38. *See, e.g., In re Terpley (II)*, 3 F.S.M. Intrm. 145 (App. 1987) (Panel members were Justice Benson, Peter C. Siquenza, Jr., of the Superior Court of Guam, and Ramon G. Vilagomez of the CNMI trial court.).

39. *See, e.g., Engichy v. FSM*, 1 F.S.M. Intrm. 532 (App. 1984) (Panel members were Justice King, Mamora Nakamura of Palau, and Herbert D. Soll of the CNMI trial court.).

40. *See, e.g., Alaphonso v. FSM*, 1 F.S.M. Intrm. 209 (App. 1982) (Panel members were Justice King, Alfred Laureta, a U.S. District Judge from CNMI, and Herbert D. Soll.).

41. *See, e.g., Andohn v. FSM*, 1 F.S.M. Intrm. 433 (App. 1984) (Panel members were Justice Benson, Samuel P. King, a United States District Judge from Hawaii, and Dorothy W. Nelson, a judge from the U.S. Ninth Circuit Court of Appeals.). This case presents a good



practice, on appellate cases Justice King and Justice Benson sit in judgment on the correctness of the other's rulings, and, aside from these two, there is little continuity in the identity of the judges who decide on final interpretations of the FSM Constitution and laws. Moreover, in most cases the majority of the members of a given appellate panel are not even residents of the Federated States of Micronesia. Besides a lack of familiarity with the customs and laws of the FSM, the fact that panel members are usually from other jurisdictions makes it likely they would naturally tend to defer to the sole FSM judge on the panel, and most of the appellate decisions were drafted by Justice King and Justice Benson. Another possible sign of this deference is that all appellate decisions to date have been unanimous. Given this situation, the ability of Justice King and Justice Benson to individually influence, if not control, the course of law in the FSM is so magnified it can reasonably be asserted that the national Constitution and laws mean what they determine them to be.

Patterns reflecting their individual differences can easily be discerned just on a descriptive basis. The vast bulk of reported decisions thus far are from the trial court level. Justice King publishes opinions at a rate about three times that of Justice Benson.<sup>42</sup> Aside from this disparate frequency of published opinions, there is a marked difference in the length and style of the opinions which are published. Opinions issued by Justice King regularly exceed twenty pages in length and engage in wide-ranging, exhaustive discussions of the law.<sup>43</sup> Justice Bensons's opinions seldom reach ten pages, and characteristically are tersely worded and limited to resolution of matters necessary to the decision.<sup>44</sup> This difference is apparently a reflection of different perceptions of their judicial

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example of the type of unusual problems which arise when a panel is drawn from distant locations. A case from Georgia is cited in the opinion, with the following footnote: "South-eastern Reporter is not available in the Federated States of Micronesia. The report is therefore attached." *Id.* at 447 n.1. It is significant that decisions of the highest court in the FSM contain cites to courts in states of which many Micronesians have surely never heard.

42. In Volume I of the court reporter, Justice King published thirty-three trial court opinions as compared to seven opinions by Justice Benson. In Volume II, Justice King published twenty-three trial court opinions as compared to eight opinions by Justice Benson. In Volume III, Justice King published twenty-eight opinions as compared to ten by Justice Benson. Although statistics on the docket are not available, this disparity cannot solely be explained by a greater number of court filings in the areas covered by Justice King since the workload is divided in a roughly equal allocation. Rather, it appears that Justice King has a greater propensity to write and publish opinions.

43. See, e.g., *Etpison v. Perman*, 1 F.S.M. Intrm. 405 (Pon. 1984) (27 pages); *FSM v. Skilling*, 1 F.S.M. Intrm. 464 (Kos. 1984) (22 pages); *Suldan v. FSM (II)*, 1 F.S.M. Intrm. 339 (Pon. 1983) (25 pages).

44. See, e.g., *Truk v. Hartman*, 1 F.S.M. Intrm. 43 (Truk 1981) (4 pages); *Neimes v. Maeda Construction Co.*, 1 F.S.M. Intrm. 47 (Truk 1981) (6 pages).

role. Justice King's philosophy is evident in a quote from a copious, early appellate decision he wrote: "[T]o assist in developing the jurisprudence of this new nation, we find it appropriate here to discuss at some length several fundamental aspects of this case."<sup>45</sup> One final pattern of note is that without exception, every significant discussion of custom thus far has come in opinions written by Justice King.

### C. Custom and Tradition

#### 1. Criminal Cases

Initially custom was raised primarily in criminal cases, a circumstance which in some respects sets the direction for its extension into other contexts. The early criminal cases dealing with custom focused not on the Judicial Guidance Clause, but on several provisions in the criminal code which specifically address custom. In *FSM v. Ruben*,<sup>46</sup> the defendant Ruben was charged with assault with a dangerous weapon after he cut his brother-in-law, Terry, with a machete late one night when Terry came to Ruben's house in an inebriated condition demanding to be let in. Ruben admitted that under custom he had special obligations to his brother-in-law, which prohibited him from attacking Terry and which allowed Terry access to his house, although Ruben denied that this customary right extended to such late night entries.<sup>47</sup> Ruben tendered a plea of guilty "because he believed he had violated custom by striking his brother-in-law."<sup>48</sup> Justice King did not accept the guilty plea and, following a trial, acquitted Ruben based on the common law defense of reasonable use of force in the protection of family and household.<sup>49</sup>

Opposing the acquittal, the government argued that Ruben could not invoke this common law defense because under customary law he had no privilege to refuse access to his brother-in-law.<sup>50</sup> Justice King ruled the government had failed to meet the burden of proof imposed by the following criminal code provision:

- (1) Generally accepted customs prevailing within the Federated

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45. *Alaphonso v. FSM*, 1 F.S.M. Intrm. 209, 211 (App. 1982). Justice King stated on the record in another case his philosophy about opinions: "The Court's policy is to make its opinions public and to turn over copies of the opinions to the Public Information Officer as part of the Court's wish to develop a system of jurisprudence here in the Federated States of Micronesia." *Skilling v. FSM*, 2 F.S.M. Intrm. 209, 215 (App. 1986).

46. *FSM v. Ruben*, 1 F.S.M. Intrm. 34, 34-42 (Truk 1981).

47. *Id.* at 39.

48. *Id.* at 41.

49. *Id.* at 41-42.

50. *Id.* at 39-40.

States of Micronesia relating to crimes and criminal liability shall be recognized and considered by the National Courts. Where conflicting customs are both relevant, the Court shall determine the weight to be accorded to each;

(2) Unless otherwise made applicable or given legal effect by statute, the applicability and effect of customary law in a criminal case arising under this act shall be determined by the Court of jurisdiction in such criminal case;

(3) Where there is a dispute as to the existence or effect of customary law applicable to a criminal case arising under this title, the party asserting applicability of customary law has the burden of proving by a preponderance of the evidence the existence, applicability, and customary effect of such customary law.<sup>51</sup>

Under the terms of this provision the burden of proof is invoked only when there is a "dispute." Justice King acknowledged the existence of the general custom, but found there to be a dispute whether custom allowed the "timing and manner" of Terry's entry.<sup>52</sup>

The relationship between custom and court proceedings was addressed more directly in the next case involving custom, *FSM v. Mudong*.<sup>53</sup> The defendant Mudong was charged with assault. Shortly thereafter, over a hundred persons from the various families involved gathered for a duly tendered and accepted traditional apology.<sup>54</sup> An affidavit from the victim's family states: "[I]t is the consensus of both sides that bad feeling be put to a stop, and that further prosecution of the criminal case may hinder that goal . . . for that reason, both sides agreed that request has to be made to the proper authorities to dismiss the case. . . ."<sup>55</sup> The prosecutor refused to dismiss the case,<sup>56</sup> which prompted the defendant to file a motion to dismiss with the Court. Justice King began his analysis by noting that under Trust Territory High Court cases customary forgiveness could not preclude criminal prosecution.<sup>57</sup> He then acknowledged that "Congress has set aside the previous

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51. 11 F.S.M.C. § 108 (1982); *FSM v. Ruben*, 1 F.S.M. Intrm. 34, 38-40 (Truk 1981).

52. *Id.*

53. *FSM v. Mudong*, 1 F.S.M. Intrm. 135 (Pon. 1982).

54. *Id.* at 137.

55. *Id.*

56. *Id.* at 136. The prosecutor in the case, Fredrick Canavor, was an expatriate American.

57. *Id.* at 138. See *Trust Territory v. Lone Lino*, 6 T.T.R. 7 (Tr. Div. Marshall Is. 1972); *Celis v. Trust Territory*, 3 T.T.R. 237 (Tr. Div. Marianas Is. 1967); see also Arnett, *supra* note 17, at 196 ("Once the offending party was forgiven in accordance with customary practice, it was as if the offense had never occurred. This often caused prosecutors serious difficulties in that, as far as their complaining witness was concerned and would testify, the offense never

assumption that customary law must always yield to specific statutory provisions."<sup>58</sup> Nevertheless, Justice King concluded that customary settlements do not require the court to dismiss criminal proceedings. In support of this finding he discussed the common law doctrine of prosecutorial discretion and expressed reluctance to encroach upon this discretion.<sup>59</sup> Again, as in *Ruben*, Justice King ultimately couched his decision in terms of the failure to meet the burden of proof.

Justice King's phraseology of the required showing is particularly instructive: "[T]he defendants have offered no evidence to establish that dismissal of a court proceeding is one of the 'customary' results invariably flowing from an apology ceremony."<sup>60</sup> Obviously, prior to foreign contact there were no "court proceedings" or even "crimes" in the Western sense.<sup>61</sup> Justice King recognized that a hundred years ago a customary settlement resolved the matter completely, but pointed out that the situation changed with time as the Germans and then the Japanese set up court systems and maintained control over punishment for crimes.<sup>62</sup> He reiterated that under American rule, customary forgiveness had no effect on court proceedings.<sup>63</sup> Consequently, he found, "against this background we may not merely assume today a viable principle of customary law to the effect that a customary settlement mandates dismissal of criminal court proceedings."<sup>64</sup> Justice King relied upon the apparently reasonable proposition that what matters is the effect of customary forgiveness today, not a hundred years ago. The problem with his narrow formulation of the required showing is that by necessity it leads back to the Trust Territory policy of custom being subservient to written law, which is the relation between custom and law today precisely because that is what the Trust Territory allowed for the preceding forty years. By sleight-of-reason, the Constitutional and statutory effort to raise cus-

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happened. However, the [Trust Territory] Court uniformly held that, notwithstanding the resulting difficulties of proof and the problem of discouraging public cooperation with law enforcement, custom had to yield to the law.").

58. *FSM v. Mudong*, 1 F.S.M. Intrm. 135, 139 (Pon. 1982) (considering Article V of the Constitution and section 108 of the criminal code).

59. *Id.* at 140. Justice King cited an FSM case, *Nix v. Ehmes*, 1 F.S.M. Intrm. 114 (Pon. 1982), in support of the doctrine of prosecutorial discretion. *Id.* The holding in *Nix* was based entirely on United States case law.

60. *FSM v. Mudong*, 1 F.S.M. Intrm. at 141-42.

61. See *Koike v. Ponape Rock Products*, 3 F.S.M. Intrm. 57, 70 n.2 (Pon. S. Ct. Tr. 1986) ("Pohnpeians do not distinguish criminal wrong from civil wrong. Both are considered and looked at as wrongs which ought to be remedied by the wrongdoer, if not avenged.").

62. *Mudong*, 1 F.S.M. Intrm. at 142-43.

63. *Id.* at 143, 146-47.

64. *Id.* at 143.

tom from its "previous inferior status"<sup>65</sup> was vitiated.

Justice King ended the opinion with the conclusion that customary law and the legal system "serve different purposes."<sup>66</sup> Customary law deemphasizes the notion of individual responsibility in favor of group responsibility.<sup>67</sup> Contrasted against this, Justice King posited that the legal system focuses on individual guilt as a method to preserve order and respect for the law.<sup>68</sup> Perhaps unknowingly, in driving this wedge between custom and the legal system, Justice King relied upon the quintessentially Western concept of the separate, legitimate interests of the state, a notion which fits less readily on small island societies where until relatively recently there was no "state" entity and where the focus of social and cultural life was and still is the community. Inexplicably, there is no mention in the decision of the Judicial Guidance Clause or the possibility that this Clause effected a merger of custom and legal system rather than a separation.

*Alaphonso v. FSM*<sup>69</sup> is the last opinion in a criminal case to contain an extended discussion of custom, and the only one to address the Judicial Guidance Clause. Alaphonso was convicted of three counts of assault with a dangerous weapon. He appealed the conviction on the grounds of insufficiency of evidence.<sup>70</sup> Raising the issue *sua sponte*, Justice King pointed out that the parties "have merely cited legal authorities from the United States, including decisions of United States federal and state courts, without explaining why those authorities are pertinent to these issues before this Court."<sup>71</sup> After a review of the legislative history of the Judicial Guidance Clause, the court concluded that it is not bound by such authorities and "must not fall into the error of adopting the reasoning of those decisions without independently considering suitability of that reasoning for the Federated States of Micronesia."<sup>72</sup> Following this

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65. *Id.* at 139 ("Customary law is not placed in an exalted or overriding posture under the Constitution and statutes of the Federated States of Micronesia, but neither is it relegated to its previous inferior status.").

66. *Id.* at 144-46.

67. *Id.* at 144-45 ("Major purposes of customary forgiveness are to prevent further violence and conflict, to soothe wounded feelings, and to ease the intense emotions of those most directly involved so that they can go about their lives in relative harmony.").

68. *Id.* at 145 ("The view of the constitutional legal system is to be toward and from all of society, not just the communities of the defendants and the victims.").

69. *Alaphonso v. FSM*, 1 F.S.M. Intrm. 209 (App. 1982).

70. *Id.* at 210.

71. *Id.* at 212. This observation by the Court undoubtedly surprised counsel in the case. It had long been standard practice in the FSM, carried over from the Trust Territory Courts, for counsel as well as the FSM Court to rely almost exclusively on American cases.

72. *Id.* at 213.

assertion of independence, the Court noted the similarity between the due process clause of the FSM Constitution and the United States Constitution, discussed the leading United States Supreme Court cases interpreting the due process clause, and adopted for the FSM the American interpretation of the due process clause existing at the time of the Micronesian Constitutional Convention.<sup>73</sup> The theory behind the Court's analysis is that the drafters knew how the words they borrowed were interpreted and applied and by use of the same language they endorsed the prevailing interpretation. Consideration of the local applicability of this case law was summarized by a statement of the Court's confidence that, no different than Americans in this regard, Micronesians "wish to safeguard citizens from dubious and unjust convictions."<sup>74</sup>

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73. *Id.* at 214-23 (discussing at length *In re Winship*, 397 U.S. 358 (1970), as well as other leading cases). Legislative history to the Declaration of Rights mentions decisions of United States courts interpreting similar provisions. See *Standing Committee Report No. 23*, in 2 CONSTITUTIONAL CONVENTION, *supra* note 16, at 793-804; see also *Tosie v. Tosie*, 1 F.S.M. Intrm. 149, 153-54 (Kos. 1982). However, none of the delegates were legal experts and it is nothing less than a fiction to believe they had more than a general understanding of the terms and phrases they borrowed from the United States Constitution. Certainly their knowledge of the case law for the most part did not extend past the case citations in the Committee reports. See N. MELLER, *supra* note 5, at 196 ("But there was a problem beyond interpretation or minimizing the use of 'legalism,' for all of the English terminology employed was technical in the sense that it depended upon a warp and woof of historical concept and legal experience with which few of the delegates were adequately conversant, regardless of their English-speaking abilities."). Anticipating what a later court might wrongly infer, as Justice King in fact did, delegates who feared adoption of American law gave notice that they would "make a motion to strike from all records of this Convention all reference to U.S. common law." *Id.* at 210 n.7. The motion did not come about, but their prescient fears have been confirmed.

74. *Alaphonso v. FSM*, 1 F.S.M. Intrm. 209, 221 (App. 1982). Following is the court's full discussion of this issue:

It may conceivably be argued that in island society the risk of 'dubious and unjust conviction' [quoting *Winship*] is diminished so that the reasonable doubt standard becomes unnecessary. The theory would be that, since so many people on an island know each other, everybody 'knows' who is guilty and who is not. However, there is no reason to believe that people of islands are more immune from rumors, prejudice, mob action and hysteria than are people who live on other geographical configurations. Indeed, we have all seen examples of 'truths' rapidly accepted in small communities, later rejected as incorrect and unfounded. It appears that the need for a reasonable doubt standard is at least as great here as in other societies.

We nevertheless believe that the people of the Federated States of Micronesia will hold greater respect for their criminal justice system if it proceeds cautiously and respects the liberty of individual Micronesian citizens rather than responds to the tensions and passions of the moment and sacrifices individuals to the expectations of an inflamed community.

*Id.* at 221-22. It is difficult to quarrel with these observations. However, they tend to conceal that the choice is one of degree—whether the "preponderance of the evidence" or the "beyond a reasonable doubt" standard is appropriate to Micronesia. Presumably either standard would guard against the passions of the community and dubious convictions, the difference being only the acceptable margin of error.

*Alaphonso* has had a major impact beyond the criminal arena and is one of the most often cited cases in later FSM Supreme Court decisions. The significance of this case lies less in its specific holding than in the mechanical litany it devised, which subsequently has been followed time and again: FSM Court is independent; language of law is similar to United States law; review United States case law; rationale is applicable to FSM; adopt American interpretation for FSM.<sup>75</sup> Since almost all of the existing laws in the FSM, including the Constitution, were modeled after American counterparts, or taken directly from former Trust Territory laws which were themselves modeled upon American laws, the end result is the wholesale adoption of American case law for the FSM.<sup>76</sup>

Together, *Ruben*, *Mudong*, and *Alaphonso* form the core case law for treatment of custom in criminal cases. Although these cases were essentially treated the same, each involved a conceptually distinct application of custom. *Ruben* considered the effect of custom on an element or defense to a specific crime—what is or is not illegal. *Mudong* considered the effect of custom on whether charges should be brought—institutional roles and the administration of justice. *Alaphonso* considered the standard of proof for conviction—the protection of individuals from the exercise of government power. They all share the feature that the Court by its words paid homage to custom, while by its actions and in outcome the law continued to defer to American standards. Up to the present, the argument that custom should be used to modify the usual United States statutory or case law has not prevailed in any reported criminal case. Most often, the effort to invoke custom is rebuffed by the Court on the grounds that the proponent did not meet the narrowly formulated burden of proof of showing the existence or effect of the custom at issue.<sup>77</sup>

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75. See, e.g., *Falcam v. FSM*, 3 F.S.M. Intrm. 112 (Pon. 1987) (accept common law); *Rauzi v. FSM*, 2 F.S.M. Intrm. 8 (Pon. 1985) (court not bound, will follow common law of taxation); *FSM v. George*, 1 F.S.M. Intrm. 449 (Kos. 1984) (court not bound, will accept United States Fourth Amendment case law).

76. See, e.g., *FSM v. Jonathan*, 2 F.S.M. Intrm. 189 (Kos. 1986) (adopt United States law on protection against self-incrimination); *Ponape Transfer & Storage v. Pohnpei State Pub. Lands Authority*, 2 F.S.M. Intrm. 272 (Pon. 1986) (rules of procedure same, adopt United States law on issuance of injunctions); *Semens v. Continental Air Lines*, 2 F.S.M. Intrm. 131 (Pon. 1985) (common law on contract and tort); *Ponape Chamber of Commerce v. Nett*, 1 F.S.M. Intrm. 389, 393 n.1 (Pon. 1984) (same meaning of "cases" for jurisdiction); *Engichy v. FSM*, 1 F.S.M. Intrm. 532, 545 (App. 1984) (adopt *Glasser* standard of review, review evidence in light most favorable to court findings of fact); *Suldan v. FSM (II)*, 1 F.S.M. Intrm. 339 (Pon. 1983) (similarity of constitutional scheme to find power of judicial review).

77. See, e.g., *Teruo v. FSM*, 2 F.S.M. Intrm. 167 (App. 1986); *FSM v. Raitoun*, 1 F.S.M. Intrm. 589 (Truk 1984). A case recognizing the status of traditional leaders, *In re Iriarte (II)*, 1 F.S.M. Intrm. 255 (Pon. 1983), concluded that the law must not demean this status, but otherwise the traditional leader was to be treated like any other defendant. *Id.* at 15-17.

## 2. Civil Cases

This pattern of treatment of custom in criminal cases can also be found in a more refined form in the context of civil cases. Civil cases were not affected by the statutory provision in the criminal code specifically addressing custom, so the Court more directly confronted the impact of the Judicial Guidance clause. *Semens v. Continental Air Lines, Inc.*,<sup>78</sup> contains the most in depth examination of the background and meaning of this clause. The case involved a basic contract and personal injury action, and the issue was whether common law doctrines would apply. Again sua sponte, Justice King raised the impact of custom under the Judicial Guidance Clause.<sup>79</sup> The case was decided in 1985, approximately four years after the Court officially began to function, and still the meaning of the Judicial Guidance Clause had not been clarified.

Following an extensive recitation of the legislative history, Justice King concluded that in disputes involving contracts or negligence, the Judicial Guidance Clause imposed the following "requirements on the Court's analytical method:"

First, in the unlikely event that a constitutional provision bears upon the case, that provision would prevail over any other source of law. Second, any applicable Micronesian custom or tradition would be considered and the Court's decision must be consistent therewith. If there is no directly applicable constitutional provision, custom or tradition, or if those sources are insufficient to resolve all issues in the case, then the Court may look to the law of other nations. Any approach drawn from those other sources, however, must be consistent with the letter and spirit of the Constitution as well as principles of, and values inherent in, Micronesian custom and tradition.<sup>80</sup>

Justice King set out a descending order of inquiry which appears to place custom in a hallowed position just below the Constitution, and which sets the test of legitimacy to be consistency with the "principles" and "values" underlying the customs rather than the specific customs themselves. This enlightened approach at last seemed to give custom its due.

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78. *Semens v. Continental Air Lines*, 2 F.S.M. Intrm. 131 (Pon. 1985).

79. *Id.* at 137-42. He concluded that the Judicial Guidance Clause placed an affirmative obligation on the Court to consider custom and tradition regardless of whether the issue was raised by the parties. *Id.* at 139-40 (citing *Alaphonso v. FSM*, 1 F.S.M. Intrm. 209, 213 (App. 1982)).

80. *Id.* See also *Rauzi v. FSM*, 2 F.S.M. Intrm. 8, 14 (Pon. 1985) ("The constitutional [Judicial Guidance Clause] provision identifies as our guiding star, not the *Restatement* or decisions of United States courts concerning the common law, but the fundamental principle that our decisions must be 'consistent' with the 'Constitution, Micronesian customs and tradition, and the social and geographical configuration of Micronesia.'").



However, by situating custom in this hierarchy, designating it as a separate source of law, he in effect insured that custom would be dismissed with a nod, as he then proceeded to do when applying this analytical method:

The business activities which gave rise to this lawsuit are not of a local or traditional nature. While there may have been a traditional arrangement whereby one party agreed to handle or move goods for another, the setting and items handled by the parties to this arrangement are of a markedly nonlocal, international character . . . .

The contract reveals no intention that Micronesian custom or tradition was to serve as the guide for interpretation of the indemnification clause. The ground handling agreement makes no reference to custom or tradition. The agreement is written in English only, not in Pohnpeian or any other language indigenous to Micronesia.

Based upon these factors, I conclude that there is no applicable Micronesian custom or tradition. Analysis may proceed to legal principles developed elsewhere.<sup>81</sup>

By defining the search for applicable custom in so specific a fashion, he dictated that the outcome of the search would be failure. Not surprisingly, Justice King concluded that United States common law was an appropriate source to resolve contract and tort issues. He simply declared that "all the [United States] common law grounds referred to . . . are consistent with Micronesian values and therefore should be adopted. . . ."<sup>82</sup> There was no mention of what these Micronesian values are or how he had identified them, or what relation they had with custom.

Once devised, this mode of narrowly specific inquiry was wielded without remorse in case after case to dismiss any possible application of custom. For example, in subsequent cases the Court found no evidence that custom had application to the conduct of judicial sales,<sup>83</sup> to the status of wage claims in employer insolvency proceedings,<sup>84</sup> to an agreement between the National Government and operators of a United States owned fishing vessel in an attempt to terminate court proceedings,<sup>85</sup> to the abuse of process tort or to whether a non-FSM citizen may engage in business within the FSM.<sup>86</sup> It appears as if this technique of juxtaposing

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81. *Semens*, 2 F.S.M. Intrm. at 140-41.

82. *Id.* at 147.

83. *Sets v. Island Hardware*, 3 F.S.M. Intrm. 365, 367 (Pon. 1988).

84. *In re Mid-Pacific Construction Co.*, 3 F.S.M. Intrm. 292, 300 (Pon. 1988).

85. *FSM v. Ocean Pearl*, 3 F.S.M. Intrm. 87, 91 (Pon. 1987).

86. *Mailo v. Twum-Barimah*, 2 F.S.M. Intrm. 265, 268 (Pon. 1986).

the term custom with these evidently modern situations and concepts was intended to patently show the irrelevance of custom, obviating the need for further discussion. A number of the opinions explicitly declared custom inapplicable because the circumstance at issue "historically" did not exist.<sup>87</sup> In all cases the result was the same: custom and tradition had absolutely no impact on the law.

*Panuelo v. Pohnpei*,<sup>88</sup> issued by Justice King soon after *Semens*, is unique in that it actually considered custom beyond a cursory dismissal. The issue was whether the State of Pohnpei was entitled to invoke the doctrine of sovereign immunity. Although neither party had suggested that custom and tradition might apply, Justice King, citing *Semens*, ruled he had an affirmative obligation to consider the issue.<sup>89</sup> Justice King took judicial notice of several historical and anthropological accounts of the conduct of Ponapean Kings.<sup>90</sup> There were, and still are, two types of traditional leaders—Nahnmwarki and Nahniken—who were obliged to "help the people."<sup>91</sup> "Even with their great powers, Nahnmwarkis are required by custom to respond to a commoner seeking a hearing through the intercession of a Nahniken for the purposes of obtaining forgiveness."<sup>92</sup> Justice King found no evidence of what he considered the "more pertinent issue" of whether the traditional leaders were required to hear complaints that the leaders themselves had harmed others.<sup>93</sup> In the absence of information bearing on this issue, he found the evidence inconclusive. Nevertheless, he continued: "It is apparent however that substantial responsiveness of leaders is crucial to the traditional system. Considerations of custom and tradition then may be seen as pointing away from sovereign immunity."<sup>94</sup> He ultimately found the state did not have sovereign immunity on a standard common law and statutory law analysis.

The extraordinary aspect of the analysis in this case is that Justice King saw fit to consider the application of custom through analogy,

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87. See, e.g., *Ocean Pearl*, 3 F.S.M. Intrm. at 91; *Mailo*, 2 F.S.M. Intrm. at 268.

88. *Panuelo v. Pohnpei*, 2 F.S.M. Intrm. 150 (Pon. 1986).

89. *Id.* at 159.

90. *Id.* at 160 n.9.

91. *Id.* at 160.

92. *Id.*

93. *Id.* at 161. It is not clear why Justice King simply did not order a separate inquiry to resolve this issue, as undoubtedly current traditional leaders could have provided him with a definitive answer. A mechanism to provide such answers is provided by the Judiciary Act of 1979, which allows for the appointment of "assessors" to advise the court on issues involving custom. 4 F.S.M.C. § 113 (1982). Although assessors have been appointed, the Court has yet to take testimony from them in a case. See Turcott, *supra* note 25, at 366-67.

94. *Panuelo v. Pohnpei*, 2 F.S.M. Intrm. 150, 161 (Pon. 1986).

rather than the usual strict inquiry. To even conceive that a custom requiring traditional leaders to listen to the complaints about their conduct has any application to the doctrine of sovereign immunity is to bravely (or blindly) leap across a vast chasm of logic and law. No other case before or after *Panuelo* considers custom through analogy.

#### D. Social and Geographical Configuration

The Court's consideration of "social and geographical" differences pursuant to the Judicial Guidance Clause has differed little from its treatment of custom. In *FSM v. Mark*<sup>95</sup> the Court examined whether a search warrant was needed to conduct a plain view search. Justice King observed that in Micronesia, which consists of many small islands scattered over great distances with limited means of transportation, few police officers, and even fewer judges, the obstacles to obtaining a warrant dictate that the same standards applied in the United States for search warrants are appropriate, but no higher or additional burdens should be imposed.<sup>96</sup> Accordingly, Justice King adopted the American "plain view" exception to the search warrant requirement.<sup>97</sup>

In *FSM v. Edward*<sup>98</sup> Justice King considered the waiver of a right to counsel. Although he adopted the same standards as those used in United States case law, he recognized that many people in Micronesia do not fully understand their right to counsel, and therefore suggested that courts should "indulge in every reasonable presumption against finding a waiver."<sup>99</sup>

In *Bukea v. FSM*<sup>100</sup> the defendant argued that cultural differences required a rule of corroboration in victim testimony rape cases. Defense counsel contended that different actions and values concerning sexuality might result in an American trial judge or even a Micronesian judge from a different area misinterpreting the actions or words.<sup>101</sup> The Court declined to adopt a rule of corroboration, holding only that these "legitimate concerns" should remind the judge to proceed with "even greater care and thoroughness than might be necessary elsewhere."<sup>102</sup>

The only situation in which social and geographical considerations

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95. *FSM v. Mark*, 1 F.S.M. Intrm. 284 (Pon. 1983).

96. *Id.* at 293-97.

97. *Id.* at 295.

98. *FSM v. Edward*, 3 F.S.M. Intrm. 224 (Pon. 1987).

99. *Id.* at 236. For the proposition of indulging in every reasonable presumption, Justice King cites *Johnson v. Zerbst*, 308 U.S. 458 (1938). *Edward*, 3 F.S.M. Intrm. at 234-36.

100. *Bukea v. FSM*, 1 F.S.M. Intrm. 487 (App. 1984).

101. *Id.* at 490-91.

102. *Id.* at 491-92.

did affect the outcome of a decision relates to recovery of attorney's costs. In *Ray v. Electrical Contracting Corp. et. al.*<sup>103</sup> the Court determined that the fact that there were no on-island attorneys who could represent the plaintiff came within the purview of the social and geographical phrase of the Judicial Guidance Clause. Thus, the plaintiff was allowed to recover attorney travel expenses as a "cost" under the statute, regardless of the bulk of U.S. law holding otherwise.<sup>104</sup>

Aside from *Ray*, of all the cases that cite the Judicial Guidance Clause, in only two did the Court clearly depart from the United States common law. In *Aisek v. Foreign Investment Board*<sup>105</sup> after noting that American commentators had mounted "legitimate arguments" against the nexus requirement for standing, Justice King declined to adopt it for the FSM.<sup>106</sup> In *Luda v. Maeda Road Construction Co. Ltd.*<sup>107</sup> Justice King refused to follow the existing common law rule on the tolling of statute of limitations in wrongful death actions. He would not accept the existing "restrictive and crabbed method of interpretation," and instead relied upon policy considerations.<sup>108</sup> Despite the fact that he exercised the freedom from strict adherence to common law provided to the court by the Judicial Guidance Clause, in neither case did Justice King cite any reason for the departure relating to custom and tradition or the social and geographical configuration of Micronesia. Rather, he simply disagreed with the prevailing law.

## E. Findings

The foregoing review of FSM Supreme Court opinions confirms that the Judicial Guidance Clause has not been applied in the fashion desired by the drafters of the Constitution. Indeed, it appears that the worst fears of the drafters—that the court would strictly adhere to United States case law—has become a reality. This outcome has to some extent been obscured by the language of the opinions, which time and again celebrates the special position of custom and tradition under the Constitution. Only after stripping away this gloss does it become obvious that there has been no real change from previous Trust Territory High Court practices which the Micronesians abhorred and from which they pointedly tried to get away. A substantial body of case law has now been

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103. *Ray v. Electrical Contracting Corp.*, 2 F.S.M. Intrm. 21 (App. 1985).

104. *Id.* at 25-26.

105. *Aisek v. Foreign Investment Board*, 2 F.S.M. Intrm. 95 (Pon. 1985).

106. *Id.* at 102.

107. *Luda v. Maeda Road Construction Co.*, 2 F.S.M. Intrm. 107 (Pon. 1985).

108. *Id.* at 111-13.

developed by the FSM Supreme Court and recent decisions cite more and more to FSM case law rather than case law from the United States. This practice merely furthers the illusion that the FSM has developed its own indigenous body of law. Even worse, this practice cements the law for future generations in a way that the Trust Territory High Court could not.

At the outset there must be a clearer delineation of the meaning of custom and tradition under the Judicial Guidance Clause. Thus far, a mass of applications have been mixed together without distinction. The opinions use the terms custom, customary law, and tradition interchangeably. Sometimes custom is looked at as law, at other times as background fact. Custom has alternately been treated in its historical form and in its current manifestation. Customs have been reviewed on the level of establishing or negating rights and obligations, as well as on the more general systemic or institutional level. Custom is used in its actual form or through analogy. Sometimes evidence of custom must be introduced. At other times the existence of a custom is implicitly assumed or judicial notice is taken.

Blame for the failure to develop a body of indigenous jurisprudence cannot fairly be placed upon the Court. The Court has conscientiously struggled with a complex, baffling, perhaps impossible task. Although the delegates to the Constitutional Convention were clear on what they did not want, they were much more vague about what they did want and how it could be accomplished. Even among Micronesians there is no consensus on precisely what role custom should assume in their legal system. There is also a substantial question whether the merging of custom with a Western legal system and concepts can even be done. For example, it is not readily apparent what, if any, relationship custom has with a proceeding in bankruptcy or the rights of a corporation. Further complications are created by the fact that as the new nation continues to grow, its external economic and political contacts will increase, which would seem to require that its laws conform to basic, generally accepted standards, at least in business matters.

## **F. State Courts on Custom**

Each of the four Micronesian states presently has functioning state court systems in various stages of development. These court systems are modeled after that of the FSM Supreme Court. All of the state court judges are indigenous, only one has a law degree; most have had training in the American common law style through a series of seminars con-

ducted by faculty members of the University of Hawaii Law School.<sup>109</sup> The states also have municipal courts designed to be informal and to deal with matters on the village level, although these courts are largely inactive and are not currently a significant factor.<sup>110</sup>

Presently there are just a few written state court opinions, all of which have been published since December 1985.<sup>111</sup> In form, the decisions are indistinguishable from traditional common law style opinions, with statements of the facts and issues and an analysis which includes reliance upon case law or statutes or other authoritative sources as the basis for rulings. For the most part, when local statutes do not apply, the opinions cite to precedent from the United States and from the FSM Supreme Court on issues of substantive law. Considering the limited legal training of the judges, their mastery of the American legal style is remarkable.

Despite this overall pattern, decisions of the State Court of Pohnpei have occasionally utilized custom as a basis for rulings. In *Hadley v. Board of Trustees*,<sup>112</sup> the Court denied a motion for a default judgment for failure to file a responsive pleading on the basis that the adversary system, "which was introduced to Micronesia and became, without our consciousness, the system in Micronesia,"<sup>113</sup> is too harsh and rigid. The Court cautioned that it "must always ensure such application [of the Rules of Procedure] be given a fair reconciliation with local customary practices . . . so that the Pohnpeian concept of justice does not unconsciously fade away."<sup>114</sup>

A maxim of customary law was directly applied by the Pohnpei State Court in *Phillip v. Aldis*<sup>115</sup> to determine the amount of damages in a

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109. See Bowman, *Judicial Seminars in Micronesia*, 9 U. HAW. L. REV. 533 (1987). A recent nominee to the Yap State Court, Martin Yinug, has a law degree from Catholic University in Washington, D.C.

110. See, e.g., Tamanaha, *supra* note 14, at 96 n.106. Municipal court judges in Yap are traditional leaders. There are ten municipalities, but only three have court systems and just a few cases—all dealing with land—have been handled.

111. The third volume of the F.S.M. Interim Reporter began to include state court opinions. To date there have been 11 opinions from Kosrae (5 of these opinions were written by Justice King sitting as a temporary state judge); 13 opinions from Pohnpei; 1 opinion from Yap; and 7 opinions from Truk.

112. *Hadley v. Board of Trustees*, 3 F.S.M. Intrm. 14 (Pon. S. Ct. Tr. 1985).

113. *Id.* at 16 ("Inasmuch as Pohnpei has its own traditional means of dispute resolution . . . it is an opportune time for Pohnpei to make necessary corrections in our legal system and to set the course in the development of our legal system in a more acceptable order, so that our citizens, now and in the future, will not regret too harshly the course we chose to follow under the authority of our Constitutional Government.").

114. *Id.*

115. *Phillip v. Aldis*, 3 F.S.M. Intrm. 33 (Pon. S. Ct. Tr. 1987).

case involving an accident to a rental car:

Plaintiff's failure to repossess the vehicle when he ought to and his acceding to defendant's continued possession and use (realizing that wear and tear would normally occur) made him guilty of what is known in Pohnpeian custom as: KE PWURONG OMW MWUR, meaning you reap the fruit of your misdeed. Application of customary law takes precedence over the common law, Pon. Const. art. 5, section 1 . . . and I think the act of the plaintiff, under the circumstances, warrants enunciation of the custom herein described.<sup>116</sup>

The opinion is especially notable because of its effortless blend of common law and customary law. The Court first cited United States case law on contract doctrine to find the defendant liable, then it applied customary law to reduce the amount of damages awarded to the plaintiff.<sup>117</sup>

The Pohnpei court similarly blended customary law and the common law of tort in *Koike v. Ponape Rock Products, Inc.*<sup>118</sup> Relying primarily on Prosser's hornbook, the Court set out the law of negligence, then extensively described Pohnpeian custom on civil wrongs.<sup>119</sup> These two sources were described in a way which showed their overlap. Common law was used as a "guide" for decisionmaking except where custom dictated a different outcome.<sup>120</sup> The Court's holding is stated in a fash-

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116. *Id.* at 38.

117. *Id.* at 37-38 (citing cases from state courts in Kansas and Washington, as well as the U.S. Supreme Court).

118. *Koike v. Ponape Rock Products*, 3 F.S.M. Intrm. 57 (Pon. S. Ct. Tr. 1986).

119. *Id.* at 70-71. The custom was described as follows:

When the injury sustained is on the body of a person (personal injury), the person causing the injury must undertake certain undertakings which include, first an apology to the injured person and his family to ease the tension, and second the provision of specialized assistance to heal the injury or stop the pain sustained by the injured person or by his family. The third is the provision of material assistance to the injured person to assist in the sustenance of his livelihood as he would be expected to provide for himself and for his family had he not been injured. Some people even provide land to the injured person as a remedy for the injury. There is no specific length of time for which the provision of such remedial assistance should continue. The impact of the injury attaches an everlasting obligation on the part of the tortfeasor to provide support for the injured person.

When the injury however results in the death of a person, the form of remedy may extend to making the person who caused the killing take the place of the deceased person in his family and provide all the services expected of the deceased. But when one undertakes to negotiate for the remedy of exchanging the person who did the killing for the deceased, one must be very careful for there is a danger inherent in the situation that the receiving family may be very receptive to the bargained exchange mainly for the purposes of revenge, and if revenge is successful a family feud is sure to continue and social unrest will follow as the clansmen join the feud.

*Id.* at 70-71.

120. *Id.* at 70-75.

ion that rests equally on customary law and common law in finding liability for negligence; the Court departed from common law in favor of custom once to reject the collateral source rule.<sup>121</sup>

Two aspects of the Pohnpeian Court's application of custom in the above cases are in sharp contrast to the FSM Supreme Court. First, the Court did not require the existence of the custom it applied in each case to be established as a matter of proof.<sup>122</sup> Nor was there a question of how the custom applied. The Court simply asserted the existence of the custom in the form of a general norm or social practice, presumably drawn from the judge's knowledge as a participant in the culture, and applied the norm to the issues in the case. Second, the Court unhesitatingly applied the customary norms to modern situations—a rental car agreement, an accident at a construction site, and the court rules of procedure. These marked differences in approach exist notwithstanding the fact that the Pohnpei court views the relationship between custom and law in essentially the same manner as that espoused by the FSM Supreme Court.<sup>123</sup>

Whether these cases presage a trend toward greater application of custom is difficult to predict. All three of the decisions were the product of one man, Chief Justice Edwel H. Santos of the Pohnpei Supreme Court, and no similar decision has been issued in almost two years.<sup>124</sup> Several factors cohere to inhibit further inroads in the use of custom. All of the states have adopted constitutions, laws, and judicial institutions modeled after those of the United States for reasons similar to those on the national level, although each preserves a special role for custom.<sup>125</sup> The overwhelming weight of these borrowed laws and institutions pro-

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121. The court declined to follow the collateral source rule for damages because the purpose behind giving to the victim is different in Pohnpeian society: "Moreover any member of the wrongdoer's family may come to the aid of the wrongdoer to contribute to the damages resulting from the negligent conduct of the wrongdoer to his victim. The Court ought to consider that kind of collateral source of payment in assessing damages, otherwise Pohnpeian social and family ties will dissipate." *Id.* at 74.

122. The State Court of Kosrae took the opposite approach due to requirement imposed by statute: "It should be noted that both counsel failed to introduce evidence of customary or traditional law. Pursuant to KC 6.303, the court cannot consider tradition unless satisfactory evidence of it is introduced." *Melander v. Kosrae*, 3 F.S.M. Intrm. 324, 326 n.1 (Kos. S. Ct. Tr. 1988).

123. *See Koike v. Ponape Rock Products*, 3 F.S.M. Intrm. 57, 64 (Pon. S. Ct. Tr. 1986) ("These constitutional provisions aim at substituting Pohnpeian (Micronesian) customs and concepts of justice as the source of law when and where there is no statute regulating or governing a given subject matter.").

124. *Phillip v. Aldis*, 3 F.S.M. Intrm. 33 (Pon. S. Ct. Tr. 1987), the latest of the three opinions, was issued on April 27, 1987.

125. *See Tamanaha*, *supra* note 14, at 98-100.



vides ready-made, easy-to-find solutions which render custom an external entity that does not easily fit.

### III. Comparable Situations

The situation now faced by the Federated States of Micronesia is common in colonial and post colonial areas throughout Africa, Asia, and the Pacific.<sup>126</sup> A plethora of anthropological studies have examined the continuing consequences of the imposition of Western legal systems on pre-state societies. Without fail, this colonial legacy has resulted in seemingly intractable problems, which, despite the diverse variation of cultures and historical conditions involved, fall into discernible patterns. This Part of the Article will first describe the underlying nature of these problems, followed by a specific look at the meaning of custom and customary law, concluding with a description of the extant strategies adopted to address the situation and the flaws in those strategies.

#### A. Consequences of Imposition of External Law

For indigenous people, externally imposed law is not their own. This tautological statement is offered as a starting point for the many implications which flow from it. Jurisprudential scholars of the West have long believed that law is intimately tied to the culture and customs of the people it governs. Blackstone, and subsequently Maitland, asserted that the common law of England was derived from custom.<sup>127</sup> Austin also believed that custom, which he defined as rules of conduct observed spontaneously by the governed, was a source of law that became positive law upon adoption by the courts and enforcement by the power of the state.<sup>128</sup> Regardless of whether one believes that the law consists of a unified system of organized principles, or is developed by the incremental aggregation of judicial decisions over time, or even accepts the Marxist conception of law as derived from the economic base, there is

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126. The phrase "legal pluralism" was used in M. HOOKER, *LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS* (1975), to describe the situation where state law in some way recognizes customary law. *Id.* at 1-4. The term also applies in situations other than colonial relationship, as in the incorporation of Indian law in North America and Aboriginal law in Australia. See generally *INDIGENOUS LAW AND THE STATE* (B. Morse & G. Woodman eds. 1987). Legal pluralism is now used by social anthropologists to describe the broader situation of competing "law generating" systems which operate in all societies. See Griffiths, *What is Legal Pluralism?*, 24 *J. LEGAL PLURALISM* 1 (1986).

127. See 1 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 67-68 (1778); 1 F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW* 183 (2d ed. 1898) ("The unenacted part—and this is the great bulk—of the law seems to be custom (*consuetudo*).").

128. 1 J. AUSTIN, *LECTURES ON JURISPRUDENCE* 101-02 (5th ed. 1885); 2 *Id.* at 540-43.

no question but that ordinarily the law reflects and matches the society to which it is attached. As anthropologist Leopold Pospisil stated: "In view of the recognition of the law's dependence upon the rest of the culture in which it exists, it amounts almost to folly to think that a legal system of one nation can be easily transplanted into another culture and applied to another society."<sup>129</sup>

"Imposition thus implies, first, an attempt to induce fundamental change; second, the application of norms that are external to society; and third, an absence of democratic consensus from that society."<sup>130</sup> Due to the alien nature of the imposed system, a divergence occurs between the normative base of the indigenous culture and that of the law,<sup>131</sup> resulting in a clash of values.<sup>132</sup> Moreover, the sudden nature of the transplantation dislocates preexisting mechanisms of social order. These mechanisms of order do not evaporate.<sup>133</sup> They are irrevocably altered but continue to function in the form of a vigorous "sublegal" system that exists in a dialectic relationship in the shadow of, influencing and influenced by, the imposed system.<sup>134</sup> These factors interact in a

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129. L. POSPISIL, *ANTHROPOLOGY OF LAW* 130 (1971).

130. Okoth-Ogendo, *The Imposition of Property Law in Kenya*, in *THE IMPOSITION OF LAW* 147, 147 (S. Burman & B. Harrell-Bond eds. 1979).

131. Pospisil relies upon this divergence to distinguish the terms customary law and authoritative law:

By customary law, then, will be meant a law that is internalized by a social group. A law is internalized when the majority of the group considers it to be binding, as when it stands for the only proper behavior in a given situation. . . .

Authoritarian law, on the other hand, is not internalized by a majority of the members of a group. A strong minority which supports the legal authority has elevated the law as an "ideal" and may have simply forced the rest of the people to accept it.

L. POSPISIL, *supra* note 129, at 194-96. This distinction also serves as a good description of the imposed law situation.

132. See Pospisil, *Legally Induced Culture Change in New Guinea*, in *THE IMPOSITION OF LAW*, *supra* note 130, at 127, 140; Okoth-Ogendo, *supra* note 130, at 165 ("It has been shown that the first reactions to this imposition generated disruptive conflict throughout the society.").

133. One reason these "sublegal" systems survive is the inability of the government which supports the legal system to effectively exert control over rural areas where many people live. See Weisbrot, *Papua New Guinea's Indigenous Jurisprudence and the Legacy of Colonialism*, 10 U. HAW. L. REV. 1, 39 (1988). An even more basic reason is that in any society "law and legal institutions can only effect a degree of control of society, greater at some times and less at others, or more with regard to some matters than others." S. MOORE, *LAW AS PROCESS* 2 (1978).

134. See Galanter, *Justice In Many Rooms: Courts, Private Ordering and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981). Drawing upon Moore's semi-autonomous social fields, Galanter argues that "indigenous law" also thrives in our own society, which has a complex, multicentric legal order. *Id.* at 19-20. In this Article, the intent is a more distinctly dualistic notion of legal and indigenous sublegal, within which ordering by the semi-autonomous social

countervailing way. The foreignness of the imposed system renders the sublegal system more comfortable and attractive to indigenous people,<sup>135</sup> while at the same time the very existence of an alternative weakens the sublegal system and alters the underlying balance of power.<sup>136</sup> A certain degree of assimilation occurs. The sublegal absorbs aspects of the legal and the legal becomes more indigenous to a point that stops rather short of complete merger.<sup>137</sup> Even after a lengthy period, including independent self-rule, indigenous people often continue to identify with the sublegal system and the transplanted system never completely loses its alien feel. At once they coexist symbiotically, yet in conflict.

The most often identified, fundamental difference between systems is the orientation of Western law toward the individual in contrast to the collective orientation of pre-state societies.<sup>138</sup> A manifestation of these

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fields continue to operate. *See* Chiba, *Conclusion to ASIAN INDIGENOUS LAW IN INTERACTION WITH RECEIVED LAW* 378, 386 (M. Chiba ed. 1986) ("The given definition of unofficial law was 'the legal system not officially sanctioned by any legal authority, but sanctioned in practice by the general practice of a certain circle of people, whether within or beyond the bounds of a country' functioning with a 'distinct influence upon the effectiveness of official law; in other words, those which distinctively supplement, oppose, modify, or undermine any of the official laws, including state law.'").

135. *See* H. RANDA, *PROBLEMS OF INTERACTION BETWEEN ENGLISH IMPOSED SYSTEM OF LAW AND LUO CUSTOMARY LAW IN KENYA* 182 (1987) ("The consequences of legal imposition in Kenya as in other colonial states of Africa imply that the indigenous people in the rural areas resorted to old traditional rules of settling disputes between their members."); *see also* Huber, *A Note on Village Courts in Papua New Guinea*, 19 J. LEGAL PLURALISM 161, 162 (1981) (people alienated from court.) ("[T]he unofficial traditional machinery of social control is apparently still working, though to a lesser extent than before.").

136. *See* J.S. FURNIVALL, *COLONIAL POLICY AND PRACTICE: A COMPARATIVE STUDY OF BURMA AND NETHERLANDS INDIA* 295 (1948) ("In either case one result is the encouragement of disputes and litigation, because people can appeal against the custom that [they] all know to the law which no one knows. Law encroaches upon custom, and the decay of custom encourages the resort to litigation."); Abel, *Western Courts in Non-Western Settings: Patterns of Court Use in Colonial and Neo-Colonial Africa*, in *THE IMPOSITION OF LAW*, *supra* note 130, at 167, 196 ("[T]he mere availability of modern courts seems to undermine tribal dispute processing elsewhere in the society."); von Brenda-Beckman, *Some Comparative Generalizations About the Differential Use of State and Folk Institutions of Dispute Settlement*, in *PEOPLE'S LAW AND STATE LAW: THE BELLAGIO PAPERS* 187, 192-94 (A. Allott & G. Woodman eds. 1985) [hereinafter *BELLAGIO PAPERS*].

137. *See* Griffiths, *Four Laws of Interaction in Circumstances of Legal Pluralism: First Steps Towards an Explanatory Theory*, in *BELLAGIO PAPERS*, *supra* note 136, at 217, 224 ("[W]hen two litigation institutions are competing for the same business, there is a tendency for the substantive law they apply to converge."); *see also* Chiba, *The Channel of Official Law to Unofficial Law in Japan*, in *BELLAGIO PAPERS*, *supra* note 136, at 208, 210-12 (legal system becomes more indigenous); Yngvesson, *Re-Examining Continuing Relations and the Law*, 85 WIS. L. REV. 623, 628-32 (1985) (mutual adaptation of systems).

138. *See* Dinnen, *Sentencing, Custom and the Rule of Law in Papua New Guinea*, 27 J. LEGAL PLURALISM 19, 40-41 (1988); Schott, *Introduction: Chairman's Report*, in *BELLAGIO PAPERS*, *supra* note 136, at 75-76; Weisbrot, *supra* note 133, at 43. Another significant differ-

alternative orientations is the emphasis on adjudication and application of the law in Western courts, as opposed to the emphasis on reconciliation and dispute settling in indigenous systems.<sup>139</sup> "One basic reason for this difference is that the primitive law operates without the overriding sanction of central political institutions, and accordingly requires consensus and support among members of the corporate groups it affects."<sup>140</sup> An equally basic reason is that in small scale societies where exit is not a viable option, people live together in continuing relationships; therefore, disputes must be resolved in a manner that brings peace through acceptance.

In addition to the previously described consequences of the clash, three major negative implications flow directly from the fact of transplantation: the inapplicability of the usual assumption that members of a society are aware of its laws; the substantial gap between the espoused law and social reality, both in relation to behavior and ideology; and the law loses some of its efficacy and must rely upon a greater degree of coercion.

As a general proposition, citizens are presumed to know the law. This presumption is patently unrealistic in the situation of imposed law.<sup>141</sup> An indigenous scholar vividly describes the reality:

So when this unfortunate citizen has a case in these courts and the judgment proclaims a law or right and duty necessarily outlandish to him, he and members of the public of like circumstances would be bewildered and in hopeless air say "Ndi Oyibo Ekwugo"—in Ibo, meaning, "The English people have decided." Surely this is not the

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ence less often referred to is the underlying structure of their respective economies. *See generally* K. NEWMAN, *LAW AND ECONOMIC ORGANIZATION: A COMPARATIVE STUDY OF PREINDUSTRIAL SOCIETIES* (1983); F. SNYDER, *CAPITALISM AND LEGAL CHANGE: AN AFRICAN TRANSFORMATION* (1981).

139. *See* M. GLUCKMAN, *THE IDEAS IN BAROTSE JURISPRUDENCE* 267 (1965); Abel, *supra* note 136, at 196; Allott, *The Future of African Law*, in *AFRICAN LAW: ADAPTATION AND DEVELOPMENT* 216, 232-33 (H. Kuper & L. Kuper eds. 1965) [hereinafter *AFRICAN LAW*]; Hoover, Piper, & Spalding, *The Evolution of the Zambian Courts System*, in *LAW IN ZAMBIA* 47, 53 (M. Ndulo ed. 1984); von Brenda-Beckman, *supra* note 136, at 192; *see also* Schott, *supra* note 138, at 76 ("Judgments in traditional courts are not simply the pronouncements of the Chief or of one person: they are the collective wisdom of the entire village; the decisions must reflect the general consensus of the community." . . . This 'system of participatory justice' . . . assures the control of the traditional courts and the acceptance of their rulings by the people concerned.") *But see* Fallers, *Administration and the Supremacy of Law in Colonial Busoga*, in *SOCIAL ANTHROPOLOGY AND LAW* 53, 59 (I. Hammett ed. 1977) (The Soga legal institution places greater stress on applying the law than on settling the dispute.).

140. Smith, *The Sociological Framework of Law*, in *AFRICAN LAW*, *supra* note 139, at 24, 41.

141. Beckstrom, *Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia*, 21 *AM. J. COMP. L.* 557, 571-72 (1973).

attitude of a person who has obtained justice and the generality of the public cannot say that apparent justice was obtained by him even though the judgement was right in the law. . . . The judgment has therefore no claim to having brought the dispute or matter in difference to finality. Peace has not enured from this judicial justice according to the law of the land. Justice has not strengthened order and stability or good government thereby.<sup>142</sup>

Not only is this situation unfair to the individual, it challenges the legitimacy of law's common claims to educate or to establish a code of conduct, both of which can hardly be true if citizens are unaware.<sup>143</sup>

By logical deduction, if the transplanted law has a different cultural base and the indigenous people are not aware of the law, their beliefs and conduct will tend to diverge from the law's prescriptions.<sup>144</sup> It cannot be expected otherwise. The effects of this gap depend entirely on its width and the length of time needed to close it, if indeed it can be closed.<sup>145</sup> Whatever the consequences, including "outlawing" the conduct of the populace, fostering anger or disrespect for the letter of the law, or rendering the law irrelevant, they can only be harmful.

Under these circumstances, the state must expend a greater degree of effort and force if the influence of the law is to permeate throughout society. "[I]t is because a rule is regarded as obligatory that a measure of coercion may be attached to it; it is not obligatory because there is coercion."<sup>146</sup> No state can perpetually marshal sufficient resources to insure compliance where there is mass disobedience, incognizance, or indifference to its laws.<sup>147</sup> Thus, all societies rely to a large extent on the willing

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142. Onyechi, *A Problem of Assimilation of Dominance*, in AFRICAN INDIGENOUS LAWS 268, 291 (T.O. Elias, S.N. Nwabara, & C.O. Akpamgbo eds. 1975).

143. Onyechi quotes a court opinion by Lord Chelmsford: "Our laws must grow having our native laws, custom and practice as its *ground norm* so that citizens could properly be expected and presumed to know and understand the laws of the land as the developed and improved attitude, behavior and ethos of our indigenous society." *Id.* at 291 (citation omitted).

144. See M. HOOKER, *supra* note 126, at 478-79 (discussing gap between law's descriptive and prescriptive validity).

145. See Beckstrom, *supra* note 141, at 576-80 (potential problems with gap).

146. M. HOOKER, *supra* note 126, at 30.

147. See *id.* at 29-30 ("Indeed, Part II of Hoebel is a demonstration of the major contribution of sociological jurisprudence, that instead of positive law getting its sanction from a power attached to itself, it only succeeds in attaching power to itself when the ethical content of its norms correspond to the 'living law.'"); see also H. HART, *THE CONCEPT OF LAW* 48-89 (1961) (He discusses the fact that the bulk of people habitually obey a set of rules and addresses the difference between those who accept the normative authority of the rule and those who do not but nevertheless abide due to fear of sanction.).

cooperation of its members. When transplantation has occurred such reliance cannot be secure.

Each of the foregoing posed difficulties in one form or another for colonial administrators. One strategy used to ameliorate these problems was the recognition by the imposed law system of indigenous custom, usually subject to a repugnancy clause.<sup>148</sup> With independence, the indigenous people inherited the mixed law/custom system. After having lived so long under the imposed law and with the indigenous lawmakers having been educated in the Western tradition, they naturally continued the same system, the only difference being a greater effort was made to accommodate indigenous customs.<sup>149</sup>

A last point worthy of mention is one indirect consequence of transplantation which in many areas increased following independence: the wide socio-economic gap between those who know the imposed law system and those who do not. This dichotomy tends to overlap with urban versus rural,<sup>150</sup> educated versus uneducated,<sup>151</sup> wealthy elite versus poor,<sup>152</sup> and industrial versus subsistence, all subsumed under the rubric of modern versus traditional.<sup>153</sup> This condition of a people divided cannot be attributed to the fact of transplantation alone. Pressure from the need for economic development and longstanding, pre-existing divisions contribute to the dichotomy in no small way. Nevertheless, the law frequently serves as the battleground for the dispute and it operates to maintain the disparity. It is neither the law of nor for everyone.

## B. Custom and Customary Law

Prior to a review of the strategies adopted in response to the adverse consequences of the imposition of law, the meaning of the terms custom

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148. See generally M. HOOKER, *supra* note 126, at 119-89 (describing British colonial treatment of customary law). This same approach was followed in Micronesia by the United States. See 1 T.T.C. § 103 (1980).

149. See Okoth-Ogendo, *supra* note 130, at 148 ("Indeed, because the basic training of most teachers, students, and policymakers in Africa remains Anglo-American and European, western concepts, ideas, and models will, it appears, continue to dominate the legislative processes of African countries for a long time.").

150. See Onyechi, *supra* note 142, at 290-91 (Villagers in the countryside live under traditional ways, unaware of state law.); von Brenda-Beckman, *The Use of Folk Law in West Sumatran State Courts*, in BELLAGIO PAPERS, *supra* note 136, at 77 (The imposed law is used mainly in urban and semi-urban areas; the folk law is used in rural areas.).

151. See Okoth-Ogendo, *supra* note 130, at 148 (educated were familiar with law).

152. See *id.* at 148-49 (The policymakers are committed to economic development and have a different set of values from those still living under system of indigenous order.).

153. See Snyder, *Colonialism and Legal Form: The Creation of "Customary Law" in Senegal*, 19 J. LEGAL PLURALISM 49, 75 (1981) (arguing that dichotomy between modern and traditional is used for political and economic purposes).

and customary law must be addressed. For the sake of expediency the preceding discussion subsumed these terms within the idea of sublegal system. These terms have defied precise delineation in the anthropological literature, in part because their usage has been so varied. Webster's Dictionary offers a broad definition of custom as "the whole body of usages, practices, or conventions that regulate social life: usual manner and method of living and doing."<sup>154</sup> It also defines custom more narrowly in a way which smacks of Blackstone's formulation: "long established, continued, peaceable, reasonable, certain, and constant practice considered as unwritten law and resting for authority on long consent: a usage that has by long continuance acquired a legally binding force."<sup>155</sup> As between the two terms, the former sense of the word more closely aligns with custom, the latter with customary law. Both definitions have been used interchangeably. The quandary arises in distinguishing between the two definitions, more specifically, in identifying what is customary law. Perhaps in despair, one commentator suggested it is "conceptually misleading to distinguish between 'custom' and 'customary law.'"<sup>156</sup>

From entirely different perspectives, arguments have been pressed by certain anthropologists that customary law is not customary at all, or even not law.<sup>157</sup> Customary law becomes meaningful in the context of imposed law where a state legal system is different from and in some fashion coexists with a conflicting paradigm of social order adhered to by a significant proportion of the people who live under the system. De-

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154. WEBSTER'S THIRD NEW INTERNATIONAL WORLD DICTIONARY OF THE ENGLISH LANGUAGE 559 (1976).

155. *Id.* Blackstone set forth the following criteria for custom to be recognized as common law: 1) "it has been used so long that the memory of man runneth not to the contrary"; 2) "it must have been continued"; 3) it must be "peaceable, and acquiesced in"; 4) it "may be good, though, the particular reason of it cannot be assigned"; 5) it should be certain; 6) it must be compulsory; and 7) "contradictory customs cannot both be good, nor both stand together." 1 W. BLACKSTONE, *The Inuit and Customary Law*, in INDIGENOUS LAW AND THE STATE, *supra* note 127, 76-78 (1778).

156. Richstone, *The Inuit and Customary Law*, in INDIGENOUS LAW AND THE STATE, *supra* note 126, at 239, 245.

157. Francis Snyder argues that customary law originated as an ideology that "accompanied and formed a part of colonial domination," resulting from changes in social relations due to the introduction of capitalism. Snyder, *supra* note 153, at 49-52. Martin Chanock suggests that customary law was transformed during the colonial period as "part of an idealisation of the past developed as an attempt to cope with social dislocation." M. CHANOCK, LAW, CUSTOM, AND SOCIAL ORDER 4 (1985). Lloyd Fallers contends that "[c]ustomary law is not so much a kind of law as a kind of legal situation which develops in imperial or quasi-imperial contexts in which dominant legal systems recognize and support the local law of politically subordinate communities." L. FALLERS, LAW WITHOUT PRECEDENT 3 (1969). David Weisbrot suggests that contemporary custom and customary law "is a product of discontinuity during the colonial period, followed by a reinvention of 'traditional' culture to suit modern needs." Weisbrot, *supra* note 133, at 39.

pending on which viewpoint is taken, customary law serves as a symbol either of domination by or independence under imposed law.<sup>158</sup>

This leads back to the difficulty in distinguishing custom from customary law. Webster's broader definition of custom is coextensive with the entire regulation of social life. Social order in pre-state societies was maintained by custom in this broad sense with no overt institution that could be identified as "legal" in Western terms. Once it was recognized, initially through the work of Malinowski,<sup>159</sup> that pre-state societies did indeed have the equivalent of our law, the question became how to distinguish within custom the norms, rules or institutions which were political, moral or social from those which were legal.<sup>160</sup> To find a cross-cultural way of identifying law was the goal. Adamson Hoebel formulated the most influential early test: "[A] social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting."<sup>161</sup> A number of other tests have since been composed.<sup>162</sup> No single test has gained a majority of adherents. Some believe that distinctions between which norms are legal and which are not, at least for certain groups, cannot be made,<sup>163</sup> and that to do so is a misleading ethnocentric exercise in imposing Western categories on non-

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158. Burman, *Persistence of Folk Law in India With Particular Reference to the Tribal Communities*, in *INDIGENOUS LAW AND THE STATE*, *supra* note 126, at 151, 158 ("It seemed that people looked upon the unstructured status of customary laws as a symbol of their partial independence, from the apparatus of the state . . .").

159. B. MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (1926).

160. Anthropologists interested in studying law on a comparative basis needed to be able to distinguish these different types of norms. See L. POSPISIL, *supra* note 129, at 40. ("In other words, we have to define law by discovering characteristics that identify some of the authority's decisions as legal, thus differentiating them from his statements and decisions that do not deal with law.").

161. A. HOEBEL, *THE LAW OF PRIMITIVE MAN* 28 (1954).

162. Pospisil suggests there are four attributes to law: authority, intention of universal application, *obligatio*, and sanction. L. POSPISIL, *supra* note 129, at 43. Fallers applies H.L.A. Hart's concept of rule of recognition. Fallers, *supra* note 139, at 56 ("Primary legal rules are those distinguished from the wider universe of moral norms by their union with secondary rules of recognition, adjudication, and change.").

163. Compare Richstone, *supra* note 156, at 245 ("Along with certain other aboriginal peoples, Inuit, for example, do not make distinctions between on the one hand, standards of behaviour or moral norms, and on the other, binding rules which are regularly visited with sanctions or strictly regulated.") with I. GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* 173 (1955) ("Thus the Kuta has clearly in mind a distinction between obligations it can compel people to observe, and obligations it can only urge on them as right. This gives the Lozi a distinctive body of legal rules which does not cover all obligations which are approved as moral."). Clifford Geertz argues that legal norms cannot be separated from facts, and challenges the way custom has been reduced to customary law. C. GEERTZ, *LOCAL KNOWLEDGE* 173-75, 208 (1983).



Western people. Beyond its value for academic purposes, the ability to make this distinction is of material consequence in the imposed law situation where the dominant legal system affirmatively recognizes, in court or by codification, that part of custom which is "law."<sup>164</sup> If unable to make this distinction, moral and social norms would be raised to the status of law, an outcome that would pervert the custom.

One final point, ignored in the studies on this area, must be made regarding when, in the imposed law context, the social and moral aspects of custom must be separated from the legal. As just indicated, it is necessary where custom becomes a part of the positive law of the dominant legal system. However, this separation need not be made when the dominant legal system preserves the custom by a negative method, that is, by setting a limitation on the dominant law itself such that it cannot be construed or applied in a manner inconsistent with custom.<sup>165</sup> Admittedly, such self-imposed limits on the dominant legal system are uncommon. Nevertheless, when this is the case, whether a custom is considered moral, social, or legal does not matter. The law must still be consistent with custom whatever its underlying nature.

### C. Strategies Applied to Imposed Law Situations

Three strategies have been used, either in combination or individually, to bring indigenous mechanisms of social order under custom within the ambit of the dominant legal system: (1) codification of customary law norms; (2) use by state courts of customary law as a source of law in a fashion analogous to common law and (3) creation of informal "native" or "village" courts which apply predominantly customary law. Each of these three strategies suffers from various defects. These individual defects aside, they all suffer from the same critical flaw which makes them incapable of providing a complete solution. The flaw in these strategies is in their aim. Custom cannot be removed from its original medium to be placed in another and still maintain its integrity.

An extreme reason offered for why this cannot be done is that the essence of social order in pre-state societies lies in the complex of rela-

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164. David, *Critical Observations Regarding the Potentialities and the Limitations of Legislation in the Independent African States*, in *INTEGRATION OF CUSTOMARY AND MODERN LEGAL SYSTEMS IN AFRICA* 43, 46-49 (1971) [hereinafter *INTEGRATION*] (against codifying those customs which deal solely with personal relations); Grant, *Recognition of Traditional Laws in State Courts and the Formulation of State Legislation*, in *INDIGENOUS LAW AND THE STATE*, *supra* note 126, at 259, 260 (using a modified form of Hoebel's test to identify which customs should be codified).

165. See Tamanaha, *supra* note 14, at 89-94 (provision in Yap Constitution which provides that the constitution may not be interpreted to invalidate any recognized custom).

tions and social processes, not in norms or rules:<sup>166</sup>

An adequate account of a dispute therefore requires a description of its total social context—its genesis, successive efforts to manage it, and the subsequent history of the relationship between the parties. . . .

. . . [I]ndigenous rules are not seen *a priori* as “laws” that have the capacity to determine the outcome of disputes in a straightforward fashion. It is recognized, rather, that the rules may themselves be the object of negotiation and may sometimes be a resource to be managed advantageously.<sup>167</sup>

Under this view, it is inherently impossible to incorporate the customary system of order (other than by merely not interfering with it) because it is an irremovable aspect of social life. To extract only the rules would be useless.

A less extreme version recognizes the weight of the norms, but asserts that they function properly only within the traditional dispute resolution process.<sup>168</sup> “The essence of the customary systems may be said to have lain in their processes, but these were displaced, and the flexible principles which had guided them were now fed into a rule-honing and -using machine operating in new political circumstances.”<sup>169</sup>

A final reason why custom resists codification and use in court focuses on the nature of the norms themselves. The problems identified with norms, a sampling of which is set forth below, all follow a recurring theme that relates to the discussion of norms in the preceding section. Assuming that customary norms can be identified and labeled as such,<sup>170</sup> they have been found to be in a state of flux with different versions;<sup>171</sup>

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166. See J. COMAROFF & S. ROBERTS, *RULES AND PROCESSES: THE CULTURAL LOGIC OF DISPUTE IN AN AFRICAN CONTEXT* 11-17 (1981).

167. *Id.* at 13-14.

168. See von Brenda-Beckman, *supra* note 150, at 87 (“In village processes of decision making the substantive content of a norm therefore is not sharply distinguished from the decisionmaking process in which the norm is used, even though this ‘procedural’ aspect is not explicit in the norm statement.”). Norms are guidelines for decisions rather than clear prescriptions. Zion, *Searching for Indian Common Law*, in *INDIGENOUS LAW AND THE STATE*, *supra* note 126, at 121, 129 (“First and foremost, the Indian common law is procedural. It deals with relationships, mutual obligations. . . . This is not to say that there is no substantive law.”).

169. M. CHANOCK, *supra* note 157, at 62.

170. See Woodman, *Customary Law, State Courts, and the Notion of Institutionalization of Norms in Ghana and Nigeria*, in *BELLAGIO PAPERS*, *supra* note 136, at 143, 154-55 (Norms cannot be given precise meaning when isolated from their function in the entire body of legal rules.).

171. Burman, *supra* note 158, at 158.

there are conflicting or contradictory norms;<sup>172</sup> norms are described in a "vague or elusive" manner;<sup>173</sup> norms have multiple contingencies or exceptions;<sup>174</sup> stated norms often do not match actual behavior;<sup>175</sup> it is not always clear how to move from the abstract norm to application in a given case;<sup>176</sup> and sometimes a number of normative orders coexist.<sup>177</sup>

Though this description might indicate to the Western ear that the rules are arbitrary, all of these characteristics are actually a reflection of the flexibility of normative systems which functioned well within their original habitat, but which chafe against the "rule of law" orientation of courts and defy the inherent rigidity of codification. "[T]he norms cannot retain their original content as components of a different system."<sup>178</sup> Whether the technique of incorporation used is codification,<sup>179</sup> state

172. Bentsi-Enchill, *The Colonial Heritage of Legal Pluralism (The British Scheme)*, [1 No. 2] ZAMBIA L.J. 1, 23 (1969).

173. M. CHANOCK, *supra* note 157, at 63.

174. A. NEKAM, EXPERIENCES IN AFRICAN CUSTOMARY LAW 4-5 (1966); *see also* S. Moore, *Descent and Legal Position*, in LAW IN CULTURE AND SOCIETY 374, 376 (L. Nader ed. 1969) ("[T]he more multiplex the social relations, the more contingencies there are that may affect any particular act or transaction. This multiplicity not only makes it difficult to state the norms precisely, but sometimes may make it impossible, since the assortment of contingencies can vary so much from one case to another.").

175. *See* M. CHANOCK, *supra* note 157, at 17. Sally Falk Moore argues that this divergence "is not a matter of ideal-real dichotomies, nor of norms and violations. On the contrary, such 'exceptions' are part of the system. They are legitimate alternatives to other arrangements and there is legal provision for them." S. Moore, *Introduction, Comparative Studies*, in LAW IN CULTURE AND SOCIETY, *supra* note 174, at 347-48.

176. Comaroff & Roberts, *The Invocation of Norms in Dispute Settlement: The Tswana Case*, in SOCIAL ANTHROPOLOGY AND LAW, *supra* note 139, at 77, 79.

177. *Id.* at 80. Lest we forget, many of these same characteristics of norms, including their divergence from actual behavior, their conflicting nature, the difficulty in going from the abstract to application, and the existence of conflicting normative orders, has also been observed to exist in western legal systems. *See* G. CHRISTIE, LAW, NORMS AND AUTHORITY 2-31 (1982).

178. Woodman, *supra* note 170, at 157 (Woodman argues that there is "sociologist's customary law" and "lawyer's customary law" and that the two are always different.).

179. The hurdle this flexibility poses for codification are particularly insurmountable. One commentator explains why:

What seems the most misleading about these attempted codifications of customary law is not that the formulated rules would, in themselves, be necessarily wrong, but that they are fatally incomplete. For every 'rule' assumed, there are hundreds overlooked, 'rules' which would qualify those stated, balance them, enlarge them or narrow them down. An enormous proliferation of rules will be needed if one insists on proceeding that way and no outsider will ever be able to do it.

A. NEKHAM, *supra* note 174, at 147; *see also* Burman, *supra* note 158, at 159 (Efforts at codification "have not met with much success.").

Another difficulty for codification is there are different customs for different areas, whereas codification tends toward uniformity because it must cover broad areas. *See* Chisholm, *Aboriginal Law in Australia: The Law Reform Commission's Proposal for Recogni-*

courts,<sup>180</sup> or village courts (which, despite their informality, are not indigenous institutions),<sup>181</sup> this problem cannot be overcome.<sup>182</sup>

Where these strategies have nonetheless been adopted, use of custom has, as a matter of substance, been limited to land law, family law, and inheritance law. It has not often been applied in the context of torts, contracts, or commercial law.<sup>183</sup> In criminal law, custom has most frequently been treated as a cultural fact considered in mitigation.<sup>184</sup> These limitations are a further legacy of the colonial period, during which customary law was allowed to apply to those areas that were seen as "traditional," but not to the "modern" areas which came with the imposed legal system.<sup>185</sup> This pattern continued in most areas after independence.

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tion, 10 U. HAW. L. REV. 47, 64-66 (1988); Tanner, *The Codification of Customary Law in Tanzania*, 2 E. AFR. L.J. 105, 114 (1966) ("Many sections are contrary to customary law or unknown to customary law as it is now known, some sections being based on the law of one tribe only."); Woodman, *supra* note 170, at 147.

180. See J.S. FURNIVALL, *supra* note 136, at 295 ("Unwritten custom changes its character when formalized in law and legal decisions . . . Indigenous law or custom administered in a foreign court is no less foreign than law proceeding directly from a foreign ruler.").

A separate handicap for courts is their restrictive nature, the limitations on types of actions, evidence, available remedies, etc., none of which apply to customary systems. See Hoover, Piper, & Spalding, *supra* note 139, at 53; von Brenda-Beckman, *supra* note 150, at 86-87.

Finally, courts have difficulty with the ascertainment of custom. Under colonial rule the judges were foreigners who did not know the native laws, and thus the applicable law had to be established by evidence. See Bentsi-Enchill, *supra* note 172, at 21-24. This became less of a problem with native judges, who are presumed to know the native law. *Id.* One aspect of this which cannot be avoided is the different customs from different areas, the judge being familiar with his own customs. See Woodman, *supra* note 170, at 144-47.

181. See Huber, *supra* note 135, at 162 (village courts different from traditional institution) ("[T]he whole new style surrounding modern dispute settlement procedure seems to have alienated these courts from the people."); Singer, *The Subtlety of Legal Change: A Lesson From Northern Zambia*, in BELLAGIO PAPERS, *supra* note 136, at 109, 116 (local court process and demeanor not traditional); Westermarck, *Court is an Arrow: Legal Pluralism in Papua New Guinea*, 25 ETHNOLOGY 131, 132-38 (1986) (Village courts tend to follow modern style even though informal.).

182. Akin to this need for flexibility is that codification or court recognition of norms, through the process of writing and *stare decisis*, have the effect of freezing the norm in a form that would otherwise have naturally undergone change over time. Thus, a gap develops between the legal norm and the customary norm from which it was derived. See Kludze, *Evolution of the Different Regimes of Customary Law in Ghana within the Framework of the Principle of Stare Decisis*, in BELLAGIO PAPERS, *supra* note 136, at 97, 99; Woodman, *supra* note 170, at 150-54 ("By reason of *stare decisis* there persists today in Ghana rules supposedly of the customary law, but totally alien.").

183. See Allott, *A Note on Previous Conferences on African Law*, in INTEGRATION, *supra* note 164, at 4-10; Crawford, Hennessy, & Fisher, *Aboriginal Customary Laws: Proposals for Recognition*, in INDIGENOUS LAW AND THE STATE, *supra* note 126, at 27, 45-49.

184. See Crawford, Hennessy, & Fisher, *supra* note 183, at 49-52; Dinnen, *supra* note 138, at 27-49.

185. See L. FALLERS, *supra* note 157, at 61-65.

Its effect is to bind custom and set it apart:

[It] marks a peculiarly unimaginative approach to native law and custom, putting a brake upon, rather than encouraging the development of, that law on lines analogous to that of the common law. Novel situations and transactions are forever emerging and there is no living system of law that is without gaps. . . . [I]t effectually places a veto on such development [of native law]. . . .<sup>186</sup>

Attempts to expand custom beyond land law, inheritance law, and family law have been few and largely unsuccessful.<sup>187</sup>

The cumulative effect of these strategies is to further solidify the dualistic schism described earlier. Customary law and state law are placed at either end of a divide with no bridge between. This divide is reinforced by the separation between state courts and customary courts, and within state courts by the separation between custom as a source of law and all other sources of law.<sup>188</sup> Evidence of this divide can be seen in proliferation of choice of law rules, specifying when and to whom customary law is to apply.<sup>189</sup> Thus, even in those countries where a significant body of customary law has been developed and "integrated" into the legal system, the ultimate outcome is still a perpetuation of the initial dichotomy which resulted from imposition. It has even been suggested that incorporation of custom is a subtle, painless way to actually marginalize or eliminate it.<sup>190</sup>

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186. Bentsi-Enchill, *supra* note 172, at 27.

187. Customary law of torts has had greater success than contracts, commercial law, and criminal law, though even in torts Western models are used as the base and customary law as the modifier. See Allott, *The Codification of the Law of Civil Wrongs in Common-Law African Countries*, in INTEGRATION, *supra* note 164, at 169; see also Epstein, *Injury and Liability in African Customary Law in Zambia*, in IDEAS AND PROCEDURES IN AFRICAN CUSTOMARY LAW 292 (M. Gluckman ed. 1969) [hereinafter IDEAS]; Ibik, *The Customary Law of Wrongs and Injuries in Malawi*, in IDEAS, *supra*, at 305. Even less has been done in the area of contracts. See Ghai, *Customary Contracts and Transactions in Kenya*, in IDEAS, *supra* at 333; Nwabueze, *Integration of the Law of Contracts*, in INTEGRATION, *supra* note 164, at 135; Schapera, *Contract in Tswana Law*, in IDEAS, *supra*, at 318.

188. Agu, *The Dualism of English and Customary Laws in Nigeria*, in AFRICAN INDIGENOUS LAWS, *supra* note 142, at 252, 264 ("What I am protesting about is the current system whereby English Law and Courts and customary law and Courts are allowed to, as it were, maintain their separate existence in our legal system—like parallel streams whose waters never mix.").

189. See Bentsi-Enchill, *supra* note 172, at 24-29.

190. See Dinnen, *supra* note 138, at 21 ("From such a perspective the 'integration' of 'custom' within the official legal system almost invariably leads to the marginalisation of custom through its subordination to the rules and procedures of the introduced system."); Singer, *supra* note 181, at 111 ("The government of Zambia has introduced a modern system for the administration of justice while it professes to continue to support the traditional or customary

#### IV. PROPOSAL FOR THE FEDERATED STATES OF MICRONESIA

Early indications in the FSM offer convincing reasons to believe that the FSM may be embarking on a path that leads to frustration, if it has not already reached that point. The preceding survey strongly suggests that one should be suspicious of that thing called "customary law." It appears that customary law is an invention of recent vintage, derived from the attempt to fit Western conceptual categories onto different systems of social order, and to absorb and encompass the indigenous system. This does not make customary law any less real, particularly to the many indigenous people who believe in it, but it does suggest that the concept and its role deserve reevaluation when the colonial imposers have left. Of course, this departure alone does not in any way obliterate the changes wrought during their stay. Ensuing political and social changes dictate that the indigenous people cannot go back to precolonial ways. An enduring consequence is the real necessity after independence to retain major aspects of the transplanted legal system.

Yet, what they can do is question the inherited antithesis between customary law and the imposed law; to maintain it is nothing less than a self-imposed perpetuation of the colonial legacy. This distinction does not exist in areas free from a colonial past, where custom and legal system are combined, each a reflection of the other. Although attachment to customary law as an ideal previously served the important functions of providing a shared sense of identity and independence from the imposed legal system, to continue the division merely alienates people from what now is and must be their own legal system. What was once a positive feature has, by virtue of a handing over of the reins, become a negative one.

In addition to customary law, the concept of custom must also be scrutinized. Custom continued to thrive under colonial rule, albeit altered in many ways, and it exists today. At most, law effects only partial order.<sup>191</sup> Custom, in the broad sense of the regulation of social life must exist or the society would not exist, at least not without an unsustainable use of coercive force by the state. Thus, custom is not threatened by an imposed legal system so much as a particular kind of custom (the present way of social order) also known as tradition, the ways of the past in the forms that have survived until now. That is why the phrases customary

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system.") The people believe their traditional system of law is in operation, but in practice it has been undermined. *Id.* at 118.

191. See S. MOORE, *supra* note 133, at 1-9.

ways and traditional ways are often used synonymously. These phrases, which harken to the past, are misleading since both custom and tradition are dynamic processes that continually update to the present. Rather than view them as being linked to a particular time they should be seen as a continuous thread. In most societies, law and custom (tradition) develop simultaneously, but in the imposed law situation they do not. Although law is perceived as a constant threat to tradition (custom), in reality they have coexisted for some time, at least since the initial imposition. Properly seen, the cry for custom is really an expression of angst about the continuing mismatch and fear that it may be worsened, not a request to revive traditions or ways of doing things long expired.

This conclusion leads to an assertion that at first blush may seem counterintuitive: the error in all of the strategies applied thus far is their very focus on custom and customary law. These strategies inevitably drown in the blurry morass which makes up custom and norms of customary law. Even where customs or norms have been identified (at best approximately), what to do with them becomes another question. Since they have altered by virtue of the extraction, they would not operate in the same fashion in the legal system, and the mechanisms of social order have not stood still in the interim. The end result of this spent time and effort is the same imposed legal system with a small room, strictly compartmentalized, reserved for the inclusion of things which resemble what used to be customs. These integrated "customs" are anachronisms which in no way advance against the real problem, the underlying mismatch, while in the process the dualism is worsened.

Over time, under indigenous self-government, and if allowed to evolve without interference, the legal and social systems will move toward one another to form a unique, more comfortable fit.<sup>192</sup> Still, the final form of that fit is very much at stake. It can shade toward indigenous or shade toward Western depending upon the forces at play during the formative evolutionary stages. If the FSM Supreme Court continues along the path it has chosen, the period of merging will be prolonged with greater dislocation and the final form will lean toward Western. This proposal, if implemented, will remove the barrier of dualism caused by the focus on customary law and will nudge the evolutionary development in a direction toward more indigenous.

First, there must be a change in attitude. The goal must be to de-

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192. See Chiba, *supra* note 134, at 389 ("[T]he originally received law often tends, as hypothesized in the Introduction, to be converted in a long course of assimilation into law which may reasonably be called indigenous.").

velop a system of indigenous jurisprudence, not to preserve custom or customary law. These latter concerns, which will nevertheless indirectly benefit, must be relegated to the background. For this attitude to have an impact, the judges must be indigenous. Without this starting point, this proposal has no chance of success.

The basic idea behind this proposal is to inject the indigenous culture back into the legal system through the human element. The seminal part of the proposal, from which all other aspects flow, is a new, central rule of decision for cases. Rather than applying the law, the judge's objective (the rule of decision) should be "to do right." This standard "to do right" is carefully chosen and means just that; it does not mean to do justice. The judge must decide what he thinks is the right outcome, then work backward to find justifications for this outcome. These justifications may be drawn from written law, past decisions, common law, custom, social norms, the exercise of reason, or even just common sense. The only requirement is that they be articulated in an explanatory fashion in support of the decision. If these sources do not support the judge's initial outcome, he must alter his decision to one which can be supported. Each case is to be treated individually and no case has any meaning beyond its bounds, so *stare decisis* has no application. There is little that can be said about the standard "to do right" other than that everyone knows what it means. Judges possessed of the characteristics of intelligence and integrity will have internalized the mores of their culture as well as the mores of their institutional role, and therefore, their decisions will be both fair and felt by the people to be fair. Of paramount importance will be the selection of judges. Without faith in the people who make up institutions, no system, no matter how well designed, can function.

Statutes are entitled to primacy and should be applied unless the outcome would be other than what is "right." If this should be the case, in a fashion similar to how equity operates, "right" must prevail over written law, accompanied by a detailed explanation. The Constitution is to be a guiding document and ordinarily all decisions should be consistent with it, although it is not to be read in a style of strict interpretation. This less rigorous reading recognizes the reality that the Micronesian Constitution was written in a foreign language (English) by foreigners (Americans) who borrowed from another constitution (the United States Constitution). The same is also true of many of their laws. Formalisms and interpretive fictions have no place in this proposal. For example, the FSM Supreme Court's current practice of distinguishing United States Supreme Court cases issued before the Micronesian Constitution Con-



vention from those issued after, based on the patent fiction that the delegates endorsed the opinions which came before, must be repudiated. Although the delegates were generally aware of the plain English meaning of the provisions borrowed from the United States Constitution, they did not know the legal meaning as determined by American courts. All opinions of the United States Supreme Court should have the same value. They are just another source of information to be considered in deciding what is the best interpretation for Micronesia. After all, since United States courts have more than a few times reinterpreted the language of the American Constitution, there is no reason why the FSM cannot interpret the same language in a the way that best fits, rather than accept that the words have some particular meaning. For the FSM, the slate is clean with no meanings predetermined, regardless of the source or similarity of language.

This proposal shifts the orientation of the system away from the individual towards the collective. This is one reason why "to do justice" is not the rule of decision. The quest for justice imparts a sense of some standard above the community. "To do right," which will for the most part overlap with what Westerners would say is just, falls squarely upon the judge, whose standards are of the culture. Assuming the culture is oriented more toward the collective than the individual, the judge's sense of what is "right" will reflect that orientation. The outcome determinative nature of the rule of decision will result in an almost immediate closure of the gap between law and social system. People will no longer see the law as an alien system because the outcome of legal disputes will match their sense of what is correct.

The most basic of the many objections which come to mind about this proposal is the seemingly absolute discretion of the judge. Although the judge has a substantial amount of discretion, arguably he has not much more than that held by judges in the United States system. Furthermore, there are significant restraints which render his discretion far from absolute. As Jerome Frank observed:

In theory, the judge begins with some rule or principle of law as his premise, applies this premise to the facts, and thus arrives at his decision.

....

... Judicial judgments, like other judgments, doubtless, in most cases, are worked out backward from conclusions tentatively formulated.

....

... What then is the part played by legal rules and principles? We

have seen that one of their chief uses is to enable the judges to give formal justifications—rationalizations—of the conclusions at which they otherwise arrive. . . .<sup>193</sup>

Even those who believe that Judge Frank understated the influence of rules in coming to a decision and overstated the ability of judges to manipulate rules and precedents would concede that they do have much room to move, and that constraints are largely provided by other than the rules themselves.<sup>194</sup> Thus, this proposal may be giving up less than it appears.

Part of the constraint on judges will be their perception of their institutional role and their felt allegiance to the rule of law. This proposal recognizes and relies on the fact that the judges will have been educated in the law and this education will have to some extent shaped their outlook. They must be fully appreciative of the fact that it is a democratic society, and they may depart from written law "to do right" only when necessary. They must also recognize that a critical aspect of law is consistency and predictability. The requirement of explaining their rulings will help insure that they are not arbitrary.

The most important constraint comes from the nature of small island societies. An indigenous judge will be part of the community in the way that American judges are not. The judge indirectly answers to and has responsibility toward the community. As a leader of the community, the judge will have obligations of honor wrapped up in the position, such that the judge's self-image, as well as the community's perception, will be strong guarantors of proper conduct. To enhance accountability, judges should be appointed to a short initial term not exceeding four years, then be up for reappointment every ten years. This will insure that the judge is responsive to the demands of the other branches of government. A final check will be provided by the appellate level. The appellate panel should be comprised of three indigenous judges, and a case may be overturned if there is unanimous agreement that the decision was "not right." For this system to work, judges must be persons of integrity and intelligence.<sup>195</sup> Again, these are basic requirements which apply everywhere,

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193. J. FRANK, *LAW AND THE MODERN MIND* 101, 130 (1936); see also Hutcheson, *The Judgment Intuitive: The Functions of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929).

194. See G. AICHELE, *LEGAL REALISM AND TWENTIETH CENTURY AMERICAN JURISPRUDENCE: THE CHANGING CONSENSUS* 118-54 (1983) (These constraints include the judge's perception of their institutional role, the requirement of providing written opinions explaining their decisions, the process of "reasoned elaboration," and the existence of appellate courts as checks.).

195. This proposal does not directly address the problems of corruption or accumulation of

in every system.

On the state level, there are no serious obstacles to this proposal. The national courts deal on a broader basis and there is a greater need for uniformity. Such uniformity would naturally come about, despite the differences among the states, because there is a shared sense of what is Micronesian. Any disagreements may be resolved at the appellate level. Also, there should be a Supreme Court Justice from each of the four states, hearing cases in their home state, so that the judge is a member of the community. The judge must keep in mind, however, that his true constituency is the broader community of the entire four states.

Critics may assert that the needs of economic development and the modern world will not allow for such a system. A judge will undoubtedly take such matters into account in deciding "what is right." Capitalism has proven to be quite adaptable and it will assuredly survive the more flexible system envisioned. Choice of law rules will not be necessary because the nature of the parties in each case, their backgrounds, and their understandings will all be considered. The judges may be called upon to make political decisions, yet this is an irreducible element of all systems, and the benefit of this proposal is that it is not hidden.

A few structural adjustments must also be made. The jurisdiction of the FSM Supreme Court should be narrowed, and the restrictions of the adversary system softened. Considering the lack of attorneys, the judge must take a more assertive role in getting to the heart of a dispute. He or she could independently call for the presentation of information necessary to render a considered decision. The judge should not be restricted to the common law causes of action and remedial power may also be expanded. Whatever other changes may occur should be guided by the rule of decision: to do "what is right" in a given case. The spirit underlying the proposal is a merging of form and substance through a general softening of "legalisms."

Although customary law, as such, will not have special status, in operation, custom will play a far greater role than it does now. Because the judge is indigenous, he or she will know better what the customs are and how they influence the matter at hand. Evidence of custom need not be submitted, and the burden of proof will not apply. The variation of custom among areas will be less of a problem because the judge, even if

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power by judges. The system proposed would not suffer from corruption any more than the existing one because the "rule of law" orientation it supplants does not of itself provide direct checks against corruption. The guard against the accumulation of power is the continuing balance between the branches of government. The court is a political institution and judges will be sensitive to any loss of credibility or support from the other branches.

not familiar with the customs of a particular area, will know how to ascertain what these variations are and their effect. Moreover, with time, legal counsel will become more adept at raising custom as a source of decision. Custom used in a decision will not become binding, affirmative law under this proposal. The only question is whether it should apply in the case at hand to arrive at "what is right." Whether custom is considered law or fact, or a social, moral, or legal norm, will be of no consequence. They will all equally be the means to an outcome in a given case—applied so they comport with the general sense of "what is right." Application in a given case will be done in a way that approximates what the original effect of the custom was, even if it looks very different and may not even be called a custom at all.

Under this proposal, despite the no *stare decisis* rule and the apparent freedom of the judge, a consistent body of indigenous jurisprudence should develop over time which closely reflects the underlying culture and social order. This assertion is based on the tendency of legal and social order to move toward one another, combined with the practical demands on the judicial process of efficiency and predictability. This body of jurisprudence will contain many aspects of custom, because custom will often be the most readily available source of justification. It will contain a substantial body of common law rules for the same reason. These sources will blend in a way that ultimately does not distinguish between them. Optimistic as this scenario may be, it is really just an extension of what the Pohnpei State Court has done in the cases described earlier.

It is instructive that many early decisions of the United States Supreme Court contain scant citation to authority. Everything was worked out one case at a time until the decisions began to build on one another. The FSM Supreme Court can and must do the same. In support of borrowing from American case law, it may be argued that everything need not be reinvented since the system of laws has already been figured out elsewhere. But the flip side of this rationale for not engaging in original, creative analysis is that the Micronesian people are then trapped by political decisions embodied in law, worked out to fit a place not their own.

The long term benefit of this proposal is that the legal system will not develop the characteristic dualism so evident in other areas suffering the consequences of imposed law. The body of laws will be a single body that applies equally to everyone. It will be a body of law that everyone, whether educated or not, will know, with results they can both under-

stand and accept as right, even if they have had no contact with the legal system.

## V. CONCLUSION

Only the Micronesians can decide what is best for them, what system of laws they wish to live under, what will, and will not work. The analysis of FSM Supreme Court decisions clearly shows that the wish they expressed for a more Micronesian law has not occurred. Their system in its entirety is derived from United States constitutional law and common law, just as it was during the Trust Territory. With independence did not come their own legal system. Micronesia must take affirmative steps, the first of which would be to replace the American judges on the court with Micronesian judges. This step alone would not effect substantial change since the system is already in place and it is difficult for even indigenous lawyers to overcome their predilection toward common law and the American legal style embedded by their legal education. This proposal recognizes and relies upon this element of Westernization, and merges it with the indigenous to form a hybrid that more closely matches the western-but-not and indigenous-but-not society that they have. Radical as this proposal may sound, it is intended to generate thought and debate, to challenge assumptions that there are certain ways the law works, to imagine the possibilities rather than follow the same ineffective and harmful technique of incorporating norms of customary law into the imposed legal system. The Micronesians wanted judicial decisions to be consistent with the "customs and traditions, and the social and geographical configuration of Micronesia."<sup>196</sup> This directive is much broader than the incorporation of a few norms. If this wish is to become a reality, the system itself must be examined. Nothing less will do.

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196. FSM CONST. art. XI, § 11.